NO. 89-460

Supreme Court, U.S.
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# In the Supreme Court of the United States

**OCTOBER TERM 1989**

**MARATHON OIL COMPANY, ET AL**

**Petitioners**

**VERSUS**

**McMORAN OFFSHORE EXPLORATION CO., et al**

**Respondents**

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**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. "... whether a tort cause of action can ever be stated in admiralty when the only damages sought are economic."[1]

2. Whether recovery for wrongful damages requires formal ownership in the damaged component of the property or whether some other proprietary interest in the damaged property creates the requisite interest to justify recovery of economic loss.

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1 East River Steamship Corp. v. Transamerica Delaval Inc., 476 U.S. 858 at 871, 106 S.Ct. 2295 at 2302, 90 L.Ed 2d 865 (1986).

**LIST OF ALL PARTIES**

**PURSUANT TO RULE 21.1(B)**

The undersigned counsel of record for Marathon Oil Company, Petitioner, certifies that the following listed parties have an interest in the outcome of this case:

1. Marathon Oil Company;
2. Amerada Hess Corporation;
3. OKC Limited Partnership;
4. The Louisiana Land and Exploration Company;
5. Aminoil U.S.A., Inc. (now Phillips Petroleum Company);
6. ODECO, Inc.;
7. Faustug Marine Corporation;
8. Tractug Associates;
9. Continental Insurance Company;
10. McMoRan Offshore Exploration Company;

11. John E. Chance and Associates, Inc.;

12. Arthur Levy Company;

13. Enterprises, Inc.;

14. Fidelity and Casualty Company of New York;

15. National Surety Corporation;

16. Insurance Company of North America;

17. Sidell Insurance Company;

18. Underwriters at Lloyd's in London; and

19. United States Fire Insurance Company.

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Faustug/Continental Insurance Company, May 26, 1989, is published in 877 F.2d 1214 (5th Cir. 1989).

## JURISDICTIONAL STATEMENT

Petitioner seeks review of the Opinion and Decree of the United States Court of Appeals for the Fifth Circuit of January 3, 1989, as amended by its Opinions dated April 24, 1987, and May 26, 1989.

This Honorable Court has jurisdiction to entertain this Petition for Writ of Certiorari by virtue of Article III of the Constitution of the United States, 28 U.S.C. §1254 and Rule 17, et seq. of the Rules of the United States Supreme Court.

## STATEMENT OF ORIGINAL JURISDICTION

Jurisdiction exists in the trial court by virtue of the Admiralty and General

Maritime Laws of the United States and Title 28 U.S.C. 1333.

## STATUTES INVOLVED

There are no constitutional provisions, statutes or regulations directly involved in the consideration of this Petition.

## STATEMENT OF THE CASE

### A. COURSE OF PROCEEDINGS AND DISPOSITION

Proceeding in admiralty under Rule 9(h), Marathon Oil Company, Amerada Hess Corporation, The Louisiana Land and Exploration Company, Aminoil U.S.A., Inc. (now Phillips Petroleum Company) and OKC Limited Partnership (collectively "Marathon") filed a Complaint as the owner of certain mineral leases and production facilities in the U.S. Gulf of Mexico for economic losses resulting from the rupture

of a twenty (20") inch natural gas pipeline. The named defendants were:

a) Ocean Drilling and Exploration Company ("ODECO"), who was the owner and operator of the semi-submersible drilling rig (D/R) OCEAN TRAVELER, whose anchors ruptured the pipeline;

b) McMoRan Offshore Exploration Company ("McMoRan"), who was the assignee of a certain drilling contract with ODECO for the use of D/R OCEAN TRAVELER for the drilling of a well; and

c) Faustug Marine Corporation ("Faustug") who was the operator of the ocean-going tugs ZP CHALONE, ZP CONDON and ZP CAYMUS (collectively the "Tugs").

Marathon Pipeline Company (a subsidiary of Marathon Oil Company), Hess Pipeline

Company (a subsidiary of Amerada Hess Corporation) and The Louisiana Land and Exploration Company (collectively "Marathon Pipeline Company") filed a separate Complaint to recover the costs and expenses in inspecting, surveying and testing their twelve (12") inch oil pipeline which ran parallel and immediately adjacent to the twenty (20") inch gas pipeline. Additionally, Marathon and Marathon Pipeline Company filed claims and answers in limitation proceedings that had been filed on behalf of the Tugs. These proceedings were consolidated with the complaint of Texas Eastern Transmission Company ("TETCO") who, as the owner of the damaged twenty (20") inch line of pipe, sought recovery for its repair costs.

Numerous other parties[2] were brought in by third party complaint on the basis of indemnification, contribution, contract, insurance, etc.

Immediately prior to trial the claim of TETCO was settled for its agreed damages and during the trial the claim of Marathon Pipeline Company was settled for one hundred (100%) percent of its "provable damages" and legal interest thereon. Upon the conclusion of the evidence presented by Marathon, the trial court granted motions of the defendants to dismiss the Complaint and claims of Marathon pursuant to Rule 41(b).

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2 See "List of All Parties", page ii.

After hearing further evidence, the trial court entered its opinion apportioning liability between the parties, rendering a final judgment on February 1, 1988. From these judgments, Marathon filed appeals with the United States Court of Appeals for the Fifth Circuit, which were consolidated with other appeals filed by those defendants who were aggrieved by the apportionment of liability and/or the granting and/or denial of recovery and contribution.

On January 3, 1989, the United States Court of Appeals for the Fifth Circuit, among other things, affirmed the Opinion of the District Court dismissing the Complaint of Marathon. Petitions for Rehearing and

Suggestions for Rehearing En Banc were denied by the Fifth Circuit.

B. STATEMENT OF THE FACTS

In 1971, Marathon and TETCO entered into an "advance payment agreement" wherein TETCO advanced against future purchases of natural gas $5.5 million to Marathon for the exploration of gas on various mineral leases of Marathon in the U.S. Gulf of Mexico. In the period 1977 through 1983, Marathon drilled various exploratory wells in South Pass 89 and West Delta 85 and 86, making discoveries of significant oil and gas reserves in those fields.

In 1981 and 1982 Marathon and TETCO entered into long term "gas purchase agreements" wherein TETCO agreed to purchase the natural gas production from

these fields on a "take or pay" basis. Pursuant to these and other agreements, Marathon and TETCO agreed to provide certain facilities, whose combined effect allowed for the transportation of the natural gas from the offshore production platform to shore.

To achieve production and transportation of gas and liquid hydrocarbons, Marathon constructed and set platforms in its West Delta and South Pass fields. In that these fields produced significant quantities of both gas and liquid hydrocarbons, it was necessary to construct an oil pipeline to transport the liquid hydrocarbons to Marathon's facilities on shore and a gas pipeline to transport the natural gas hydrocarbons to

interconnect with TETCO's thirty-six (36") inch transmission line at Venice, Louisiana.

Marathon, through its pipeline subsidiary, undertook the total construction of the oil pipeline, sizing it to twelve (12") inches to accommodate the anticipated liquid hydrocarbon production. The gas pipeline was sized to twenty (20") inches to accommodate Marathon's proven and anticipated reserves of natural gas. Other than a meter skid on each platform and the line of pipe from the platform to shore, Marathon furnished and operated all other components of the gas pipeline, including the separators, pumps, coolers, generators, valves, compressors, control stations and mechanisms at the upstream end of the line.

The estimated total cost of these components of the pipeline, including the apportioned cost of the necessary structures, was $50 million or approximately fifty (50%) percent of the total cost of the pipeline. On the downstream end of the trunk line, Marathon furnished and operated flow lines, glycol dehydrators, sections of pipe and various control valves at a cost in excess of $1 million.

The gas pipeline was laid immediately adjacent to the oil pipeline. At the time of the casualty, Marathon was the sole user of the gas pipeline and, under the gas purchase agreement, had the right, which it exercised, to extract liquids and liquefiable hydrocarbons from the gas

stream at the downstream end of the pipeline.

On December 31, 1982, D/R OCEAN TRAVELER, an eight point stabilized semi-submersible drilling unit in tow of the Tugs, attempted to go on location on McMoRan's lease approximately three and one half (3 1/2) miles from the pipelines. Upon arrival at the McMoRan location, D/R OCEAN TRAVELER dropped her two stern anchors but then abated the anchoring procedure until adverse weather conditions subsided.

During the evening of December 31 and the morning of January 1, 1983, D/R OCEAN TRAVELER, with her two anchors still down, drifted and/or was towed westerly by the Tugs. On the dawning of a new day and a

new year, D/R OCEAN TRAVELER knew she was three (3) to four (4) miles west of the McMoRan location. Without any regard that she was in the immediate vicinity, if not over the exact coordinates of the two charted pipelines, D/R OCEAN TRAVELER commenced retrieving her two stern anchors.

Despite her ability to determine her exact location, despite the known location of the two pipelines, and despite the fact that her anchors were known to be fouled, D/R OCEAN TRAVELER continued to exert maximum force on her windlass for ten and one half (10 1/2) hours until one of her 30,000 pound anchors ruptured the twenty (20") inch pipeline. Although the probability of her anchors being fouled on the pipeline was discussed aboard D/R OCEAN

TRAVELER prior to the casualty, the retrieval of her anchors was continued until the gas pipeline was parted.

At the moment of the rupture of the pipeline, Marathon's pilot valves on its platforms detected the loss of pressure in the gas pipeline and communicated the failure to Marathon's master control station which automatically shut-in the wells, the platforms and the pipelines. Full production of gas and oil from these fields could not be resumed until a section of the gas pipeline was replaced.

The damage claimed by Marathon is the monetary value of the natural gas, condensate and crude oil that could not be produced until the repair of the twenty (20") inch pipeline.

**ARGUMENT**

The issue is that which this Court left unanswered in East River Steamship Corp. v. Transamerica Delaval, Inc.[3] wherein this Court stated:

> **We do not reach the issue whether a tort cause of action can ever be stated in admiralty when the only damages sought are economic.[4]**

The last authoritative comment by this Court on the recovery of economic damages is Robins Dry Dock and Repair Co. v.

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3 476 U.S. 858, 106 S.Ct. 2295, 90 L.Ed. 2d 865 (1986).

4 East River Steamship Corp. v. Transamerica Delaval, Inc. 476 U.S. 858 at 871, 106 S.Ct. 2295, at 2302, 90 L.Ed 2d 865 (1986).

Flint,[5] which was limited in scope and issue. Robins has been construed and applied differently by and within the various Circuits. A strong conflict exists between the Circuits with the First, Third, Fifth and Eleventh Circuits establishing a "bright line" rule that, unless the claimant owns or has a "proprietary interest" in the damaged property, there can be no recovery for economic loss no matter how direct and forseeable.

**FIRST CIRCUIT**

Barber Lines A/S v. M/V DONAU MARU, 764 F.2d 50 (1st Cir. 1985).

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[5] 275 U.S. 303, 48 S.Ct. 134, 72 L.Ed. 290 (1927).

**THIRD CIRCUIT**

Getty Refining and Marketing Co. v. MT FADI B, 766 F.2d 829 (3rd Cir. 1985).

**FIFTH CIRCUIT**

State ex rel. Guste v. M/V TESTBANK, 728 F.2d 748, on reh 752 F.2d 1019 (5th Cir. 1985), cert denied 477 U.S. 903, 106 S.Ct. 3271, 91 L.Ed. 2d 562 (1986).

**ELEVENTH CIRCUIT**

Kingston Shipping Co. v. Roberts, 667 F.2d 34 (11th Cir. 1982).

Canadian Transport Co., et al v. Hercules Carriers Inc., 720 F.2d 1201 (11th Cir. 1983) 728 F.2d 1359 (11th Cir. 1984) cert denied 469 U.S. 835, 105 S.Ct. 128, 83 L.Ed. 2d 69 (1984).

Other Circuits, faced with this issue, have permitted recovery for economic loss by applying traditional tort concepts of proximate cause, foreseeability, duty and risk. These Courts include the Second, Fourth, Sixth and Ninth Circuits in the following cases:

SECOND CIRCUIT

In re Kinsman Transit Co., 388 F.2d 821 (2nd Cir. 1968).

**... We hesitate to accept the "negligent interference with contract" doctrine in the absence of satisfactory reasons for differentiating contractual rights from other interests which the law protects ...[6]**

**We therefore prefer to leave the rock-strewn path of "negligent interference with contract" for more familiar tort terrain.[7]**

FOURTH CIRCUIT

Venore Transportation Co. v. M/V STRUMA, 583 F.2d 708 (4th Cir. 1978).

**Allowing recovery: There is nothing remote about these damages; the only objection is that they were suffered by the time charterer rather than by the owner.[8]**

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6 388 F.2d at 823.

7 388 F.2d at 824.

8 583 F.2d at 711.

SIXTH CIRCUIT

In re Bethlehem Steel Corp., 631 F.2d 441 (6th Cir. 1980) cert. denied 450 U.S. 291, 101 S.Ct. 1370, 67 L.Ed. 2d 349 (1981).

**We conclude that there is no absolute rule either in Canada or the United States which forbids recovery for economic loss where the claimant has suffered no physical injury.**[9]

NINTH CIRCUIT

Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974).

**... we refused to apply the teaching of Robins Dry Dock and Repair Company v. Flint, supra, to the situation with which the fishermen were confronted, and observed ...**[10]

Within the Circuits adopting the "bright line" rule, there is conflict by

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9 631 F.2d at 448.

10 501 F.2d at 567.

the carving out of exceptions to the absolute bar.[11] Even this Court has permitted recovery of a contractual loss without the necessity of physical damage to the property.[12]

Thus the First, Third, Fifth and Eleventh Circuits have expanded Robins to

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11 Burgess v. M/V TAMANO, 370 F.Supp. 247 (1973), aff'd 559 F.2d 1200 (1st Cir. 1977) (loss of catch);

Domar Ocean Transportation, Ltd. v. M/V Andrew Martin 754 F.2d 616 (5th Cir. 1985) (allowed time charterer to collect loss of revenue); and

Miller Industries v. Caterpillar Tractor Co., 733 F.2d 813 (11th Cir. 1984) (permitted recovery of share of loss of catch).

12 Aktieselskabet Cuzco v. The Sucarseco, 294 U.S. 394, 55 S.Ct. 467 (1935).

bar recovery for all economic losses whereas the Second, Fourth, Sixth and Ninth Circuits have ignored or circumvented Robins to permit recovery for economic loss under traditional tort analysis. The reasoning for the extension of Robins or, conversely, the absence thereof has been the subject of numerous commentaries.[13] The consensus is that there is confusion and lack of uniformity between and within the Circuits and with other courts.

In addition to the conflict between the Federal Circuit Courts, the decision of the Fifth Circuit Court of Appeals is in direct conflict with the holding of the Supreme

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13 Due to the numerous citations the footnote is produced on page 34.

Court of the State of Louisiana in PPG Industries, Inc. v. B. Dredging, Inc.[14] In PPG, which also involved the rupture of a gas pipeline by a vessel, suit was filed under the savings to suitor's clause in state court. PPG sustained an economic loss as a result of the severance of the pipeline but admitted that it had no damage to its property or to property in which it had a proprietary interest. In deciding the claim, the Louisiana Supreme Court did not adopt the "bright line" rule as enunciated in M/V TESTBANK, but adopted a "duty-risk" analysis. Rather than arbitrarily denying a recovery for economic loss where there was no damage to a proprietary interest, the court considered

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[14] 447 So.2d 1058 (La. 1984).

whether the consequences of the negligent act were foreseeable, proximate, and certain.

The Louisiana Supreme Court's balanced approach does not permit a recovery by a remote or indeterminable class of claimants. There must be an unreasonable risk of harm to the injured person that was known or should have been known by the tortfeasor before a legal duty is imposed. PPG was denied a recovery as its damages were found to be too tenuous and remote.

In the pending claim, suit could not be brought in state court in view of the limitation of liability proceedings. However, the result is that in a maritime claim, perhaps even involving the same accident, under the rule adopted by the

Fifth Circuit Court of Appeals, there would be no recovery unless there is damage to a proprietary interest; whereas, under the rule adopted by the Louisiana Supreme Court, Marathon would have been allowed to proceed provided its claim was not too remote under a traditional tort analysis.

It is interesting that English Courts, upon whom Justice Holmes relied, no longer adopt a preclusionary rule dependent upon physical damage to a proprietary interest. SCM (United Kingdom) Ltd. v. W.J. Whittall and Son, Ltd.[15]; Hedley Byrne & Co., Ltd. v. Heller & Partners, Ltd.[16] Like Justice

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15 1 Q.B. 337 (1971).

16 (1964) A.C. 465, (1963) 2 W.L.R. 101 (H.L).

Cardozo in Ultramares Corp. v. Touchet,[17] these courts were concerned that recovery for negligent interference with a contract could create "liability in an indeterminate amount for an indeterminate time to an indeterminate class".[18] The English courts in their approach to limit the class of claimants is similar to that adopted by the Second Circuit and the Louisiana Supreme Court who utilize a "duty-risk" concept amounting to requirements of foreseeability and proximity. The proximity requirement requires knowledge by the tortfeasor of the risk to which his activity exposes the

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[17] 255 N.Y. 170, 179 (1931).

[18] 255 N.Y. 170, 179 (1931).

particular plaintiff to economic loss. A similar approach has been adopted by the High Court of Australia in Caltex Oil (Australia) PTY. Ltd. v. The Dredge Willemstad.[19]

In this case, the anomalies of the "bright line" test of Robins are clearly demonstrated. Despite Marathon's contribution of an estimated $50 million towards components of the pipeline, the Fifth Circuit held that this did not constitute a sufficient proprietary interest to permit recovery. Had TETCO and Marathon not contributed individual components towards the construction of the pipeline but had jointly participated by

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[19] 136 C.L.R. 529 (1976).

sharing costs in the design, laying and construction of the entire pipeline, Marathon would have had a sufficient proprietary interest to permit recovery. This demonstrates that form, not substance, controls recovery under the "bright line" rule.

The second anomaly is that had the anchors of D/R OCEAN TRAVELER ruptured Marathon's wholly owned oil pipeline, Marathon would have had recovery for a similar loss of production in that natural gas cannot be produced in commercial quantities from these fields without producing liquid hydrocarbons. Marathon is dependent upon both pipelines being operational in order to achieve commercial production. Both pipelines perform the

same function, the carriage of hydrocarbons, and serve the same platforms. Yet, if the twelve (12") inch pipeline is damaged, Marathon is entitled to recover its economic losses whereas, if the adjacent twenty (20") inch pipeline is damaged, there is no recovery under the "bright line" rule, an illogical result.

The anomaly is further illustrated in that Marathon Pipeline Company was entitled to recover its costs and expenses in inspecting, surveying and testing the twelve (12") inch pipeline which reflected a "scratch" when the 30,000 pound anchors of D/R OCEAN TRAVELER were dragged across the pipeline. This merely illustrates that there exists a logical rule of law that permits recovery of economic damages, i.e.,

when there is a reasonable need for inspection but no physical damage is found.

The fourth anomaly is that had the "take or pay" gas purchase contract between Marathon and TETCO not contained a "force majeure" clause, then TETCO would have been obligated to pay for gas that it could not receive. Under those circumstances, Marathon would have been fully reimbursed and TETCO, as the owner of the section of pipe that was ruptured, would have had a clear right of recovery not only for the repair of physical damages to the pipeline but for its economic losses comprising payments to Marathon for gas it could not take. In this case, the Fifth Circuit expanded the "bright line" rule to release the clearly negligent tortfeasors

from liability due to a contract that they were neither parties nor beneficiaries.

These legal anomalies flowing from an extension of Robins might be expected from Alice's Red Queen but not from a logical and rational legal analysis. Marathon suggests that traditional concepts of duty, risk, causation, foreseeability and damages provide the proper answer. In this case, "duty" is not only imposed by admiralty and maritime law but by regulations for the exploration and exploitation of hydrocarbons on the U.S. Continental Shelf. The "risk" of causing damage to properly charted, permitted and laid pipelines after fouling with one's anchor is known to every mariner. That "causation" between the fouling of a pipeline with one's anchor and

the rupture is proximate and direct is indisputable. "Foreseeability" of interrupting production by severing a pipeline servicing an offshore facility, whether gas and/or oil, is known to every operator and service contractor in the U.S. Gulf. In fact, representatives of defendants were aboard Marathon's South Pass platform to triangulate the precise location of the rig. "Damages" to Marathon are real, actual and substantial. Besides the loss of liquids and liquefiable hydrocarbons in the pipeline at the time of the rupture, the proven oil and gas reserves of Marathon, due to drainage and exploitation by others, may never be recovered.

## CONCLUSION

When a rule of law, once extended, leads to inequitable results and creates principles of recovery that are at odds with the great weight of tort jurisprudence, then that rule of law merits scrutiny.

The issue raised in East River can only be answered by this Court. Without a response, parties will continue to petition the Court for a definitive answer. For the sake of uniformity among the circuits, to avoid forum shopping by parties, and to achieve judicial economy, it is respectfully suggested that a Writ of Certiorari be granted.

Respectfully submitted,

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Footnote No. 13

See generally, F. Harper and F. James, 1 Law of Torts §6.10, at 501 (1956); W. Prosser and W. Keeton, Law of Torts §129, at 978 (5th ed. 1984); Carpenter, Interference with Contract Relations, 41 Harv. L. Rev. 728 (1928); Harper, Interference with Contractual Relations, 47 Nw. U.L. Rev. 873 (1953); Henderson, Expanding The Negligence Concept: Retreat from the Rule of Law, 51 Ind. L.J. 467 (1976); James, Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal, 25 Vand. L.Rev. 43 (1972); Rizzo, A Theory of Economic Loss in the Law of Torts, 11 J. Legal Stud. 281 (1982); Scowcroft, Economic Loss in Admiralty: A Reexamination of Foundations, 16 J. Mar L. Comm. 267 (1985); Note, Interference with Business or Occupation-Commercial Fisherman Can Recover Profits Lost As a Result of Negligently Caused Oil Spill,-Union Oil Co. v. Oppen, 501 F.2d 558 (9th Cir. 1974), 88 Harv. L.Rev. 444 (1974); Comment, Union Oil Co. v. Oppen: Recovery of a Purely Economic Loss in Negligence, 60 Iowa L. Rev. 315 (1974); Comment, Negligent Interference With Economic Expectancy: The Case for Recovery, 16 Stan. L. Rev. 664 (1964); Comment, Foreseeability of Third-Party Economic Injuries-A Problem in Analysis, 20 U. Chi. L. Rev. 283 (1953); Comment, Negligent Interference With Contract:

Knowledge as a Standard for Recovery, 63 Va. L. Rev. 813 (1977); The Murky Waters of Robins Dry Dock, 60 Tulane Law Review 995 (1986); Carbone v. Ursich, 209 F.2d 178, 181-82 (9th Cir. 1953); Posner, Some Uses and Abuses of Economics in Law, 46 U.Chi.L.Rev. 281, 305 (1979); Perlman, Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine, 49 U.Chi.L.Rev. 61 (1982); Posser, Private Action for Public Nuisance, 52 Va.L.Rev. 997 (1966).

**CERTIFICATE**

I HEREBY CERTIFY that I am a member of the Bar of this Court representing the petitioners herein and that three copies of the above Petition for Writ of Certiorari to the United States Supreme Court were served upon the following named counsel for all parties, first class postage prepaid, this 5TH day of September, 1989:

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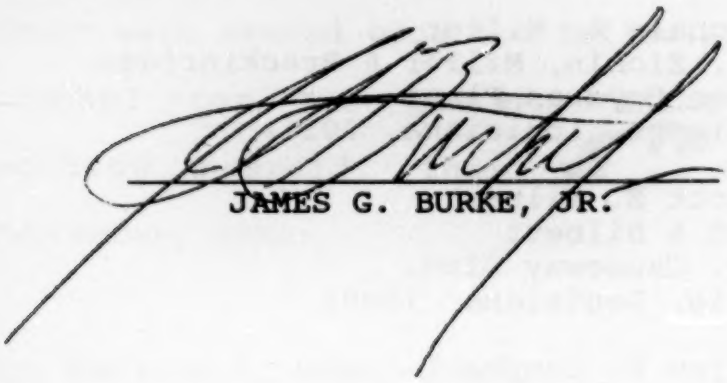

JAMES G. BURKE, JR.

89-460

NO.

Supreme Court, U.S.
FILED
SEP 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

# In the
# Supreme Court of the United States
**OCTOBER TERM 1989**

**MARATHON OIL COMPANY, ET AL**

**Petitioners**

**VERSUS**

**McMORAN OFFSHORE EXPLORATION CO., et al**

**Respondents**

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**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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**VOLUME I**
**APPENDIX TO**
**PETITION FOR WRIT OF CERTIORARI**

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# APPENDIX A

UNITED STATES DISTRICT COURT,
EASTERN DISTRICT OF LOUISIANA

TEXAS EASTERN TRANSMISSION
CORPORATION,

V.

McMoRAN OFFSHORE EXPLORATION
CO., ET AL.

Civil Action No. 83-1584 and
consolidated cases

Section "E" (2)

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MARATHON OIL CO., ET AL

V.

McMoRAN OFFSHORE EXPLORATION
CO., ET AL

Civil Action No. 83-6275

SECTION "E/2"

June 30, 1987.

Marcel Livaudais, Jr., District Judge.

**REASONS**

Having granted the Motion of Defendants, ODECO, Inc., Faustug Marine Corporation, Tractug Associates and Continental Insurance Company to dismiss the claim of the plaintiffs, Marathon Oil Company, Amerada Hess Corporation, The Louisiana Land & Exploration Company, Aminoil U.S.A., Inc. and OKC Limited Partnership (hereinafter Marathon) pursuant to Fed. R. Civ. P. 41(b), I make the following Findings.

The claims of Marathon arise out of an incident occurring on December 31, 1982, through January 1, 1983 when anchors of the Drilling Rig OCEAN TRAVELER, owned by ODECO, Inc. caused a 20-inch natural gas pipeline owned by Texas Eastern

Transmission Corporation (hereinafter TETCO) to rupture. The plaintiffs allege they have suffered economic loss in the form of deferred oil and gas production sustained during the period in which the 20-inch TETCO line was out of commission.

At the close of plaintiffs' case, defendants, ODECO, Inc., Faustug Marine Corporation, Tractug Associates, and Continental Insurance Company moved for an involuntary dismissal pursuant to Fed. R. Civ. P. 41(b) arguing that since Marathon did not have a proprietary interest in the damaged pipeline, its claim should be dismissed under the Robins-Testbank[1] line

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1 Robins Drydock Company v. Flint, 75 U.S. 303 (1927) and State ex rel Guste v. M/V TESTBANK, 752 F.2d 1019 (5th Cir. 1985), Cert. den. 106 S.Ct. 3271 stand for the

of jurisprudence.

Marathon, while admitting it does not own the 20-inch damaged pipeline, submits that the facts of the case established that Marathon had in effect a "functional ownership" of the 20-inch pipeline and this "functional ownership" places Marathon's claim outside of the class of claims prohibited by the Robins-TESTBANK rule.

In 1971 Marathon Oil Company and TETCO entered into an "advance payment agreement" wherein TETCO advanced $5.5 million to Marathon for the exploration of gas in certain fields including Marathon's mineral

---

general proposition that physical damage to a proprietary interest is a prerequisite to recovery for economic loss in cases of unintentional maritime tort.

lease of South Pass 89. In the period 1977 through 1983, Marathon drilled exploratory wells and discovered oil and gas reserves in South Pass 89. In 1981, representatives of Marathon appeared with representatives of TETCO before the Federal Energy Regulatory Commission to assist in TETCO's application for a certificate of convenience and necessity for the building of a twenty (20") inch pipeline from South Pass 89 to shore. The proposed pipeline was intended not only to provide access to the reserves in South Pass Block 89 but also to areas adjacent to Block 89.

On South Pass 89 platform A, natural gas and liquid hydrocarbons are processed, separated and then delivered into a six (6") inch pipeline owned and operated by

Marathon and transported to platform 89B where the gas hydrocarbons are separated from the liquid hydrocarbons and the gas is then processed, cleaned, scrubbed, compressed, cooled and delivered into the twenty (20") inch TETCO pipeline in a continuous flow from the well heads on 89A. On South Pass 89B, the high pressure gas from the well heads is reduced in pressure, separated, processed, cleaned and delivered into the twenty (20") inch trunk line. The low pressure gas produced on that platform undergoes similar processing but then goes through compressors and coolers prior to entering into TETCO's twenty (20") inch pipeline. (See Marathon Exhibit 37, attached to these Reasons)

On platform South Pass 89B, portions

of the platform have been leased to TETCO whereon TETCO constructed meter skids and paid to Marathon that portion of the construction costs of the platform equal to the square footage that each skid occupies in relation to the square footage of the entire platform. The meter skids are used, inter alia, to measure the amount of gas passing into the twenty (20") inch TETCO pipeline and are owned by TETCO. The exteriors of the skids are maintained by Marathon personnel and are interconnected to a system of flare, venting, and production lines of Marathon.

As the gas passes through TETCO's gas sales meters, ownership of the gas vests in TETCO in accordance with the gas purchase contract between Marathon and TETCO.

TETCO's twenty (20") inch pipeline runs down Platform 89B across the seabed of the Gulf of Mexico through Block 105 West Delta Area to the West Delta receiving station on shore in Venice, Louisiana.

Pilot valves owned, operated and serviced by Marathon are also part of TETCO's meter system. The pilot valves sense high and low pressures in the gas stream which readings are communicated to a master control panel of Marathon on each platform. When high or low pressure is detected, the master control panel automatically triggers Marathon's alarm and shut in system of the pipeline and all production wells and vessels on the platform. The pilot valves and related mechanisms are checked, maintained and

calibrated daily by Marathon personnel.

On platforms A and B South Pass 89 fifteen (15) feet above the Gulf of Mexico there exist valves in the twenty (20") inch TETCO line which are controlled and operated by Marathon's facilities and personnel. These valves sense high and low pressures in the gas stream and the readings as communicated to a master control panel on each platform. The valves will automatically shut down the wells upon a sensing of either high or low pressure in the pipeline. The valves can be remotely operated by Marathon personnel through any one of a number of manual stations located at exit points on the platforms in the event of a fire, collision or other emergency.

Necessary for the transportation of natural gas from 89 A and B is the achieving of a pressure differential which requires the compression and delivery of the gas at the upstream end of the pipeline at a constant high pressure which, in this system, is fixed at 1,100 to 1,200 psi. The natural gas that is delivered into the system is either reduced in pressure by Marathon production facilities or increased in pressure by mechanical means through high pressure compression facilities owned and operated by Marathon. Free water in the gas must be removed prior to entering the delivery system which is accomplished by the separating, processing and scrubbing facilities owned and operated by Marathon. To reduce incidents of corrosion and the

formation of hydrates in the twenty (20") inch trunk line, the natural gas must be cooled to certain acceptable temperatures. This is accomplished through after coolers on the Marathon pipeline which are also owned and operated by Marathon.

Forty-seven (47) miles from West Delta 89B, the twenty (20") inch pipeline comes ashore where it connects with TETCO's slug catcher which collects the liquid hydrocarbons, water condensate and hydrates that come out of the gaseous vapor during transportation from South Pass and West Delta to shore. For the slug catcher to operate, these liquids must be removed on a continuous basis. The slug catcher is tied into flow lines owned and operated by Marathon which remove the liquids from the

slug catcher and transfer these liquids into an oil tank for separation and allocation to Marathon.

Prior to entering the main transmission line, in order to avoid damage to down water facilities such as compressors, natural gas must be dehydrated within certain minimum requirements established by the industry which is expressed as not exceeding seven (7) pounds of water per million cubic feet of gas. From the slug catcher, the gas flows in a continuous stream through two dehydrators owned and operated by Marathon which removes the water molecules by flowing the gas molecules through a glycol bath.

Existing the dehydrators in Marathon lines, the natural gas is routed to

distillation facilities of the Warren gas plant where liquefiable hydrocarbons such as butane, propane and gasoline are removed from the gas stream. The processing of the gas by Warren is pursuant to contracts between Warren and Marathon where Marathon either receives a portion of the liquefiable hydrocarbons and/or their value.

Following the processing, the gas is then metered, analyzed and delivered back into the twenty (20") inch pipeline at the tailgate of the Warren plant for transportation to the thirty-six (36") inch transmission line of TETCO. The natural gas is transported approximately fifty (50) miles to its first TETCO compression station located at LaRose,

Louisiana.

At trial, it was established that Marathon paid for the cost and delivery of eight hundred eighty (880) feet of twenty (20") inch line in the integrated delivery system at the Warren plant. Although a representative of Marathon could not recall where the 880 feet of pipe was located, the pipe was clearly on shore in the vicinity of the Warren plant.

In the twenty (20") inch pipeline, approximately forty-seven (47) miles in length, packed with natural gas with a pressure of 1,150 pounds per square inch, a quantifiable thirty (30) million cubic feet of natural gas containing liquefiable hydrocarbons and liquids were in the delivery system at the time of the rupture.

At the moment of rupture, Marathon pilot valves on the platform detected the loss of pressure in the pipeline and communicated the failure to various control panels. These control panels activated other devices which closed off the wells and production aboard the platform including the valves in the trunk lines leading from Platforms 89A and 89B. With this rupture, thirty (30) million cubic feet of natural gas together with the liquids and liquefiable hydrocarbons were vented into the Gulf of Mexico and lost in the atmosphere. As a result of the rupture of the twenty (20") inch trunk line, all production, including oil and condensate, was automatically terminated on both platforms. The twenty (20") inch trunk

line was isolated by the closure of an underwater valve and this permitted West Delta, which was down stream of the rupture, to resume and continue production during the repair of the twenty (20") inch trunk line. In order to continue production on South Pass 89A and B, modifications were made to a twelve (12") inch Marathon oil pipeline which ran parallel to the twenty (20") inch TETCO line and production facilities to permit a commingling of the gas and oil into the twelve (12") inch line which required additional processing and separating facilities at the West Delta receiving station, a facility owned and operated by Marathon.

The above recited facts form the basis

for Marathon's assertion that although TETCO owned the damaged pipeline, Marathon had "incidents of ownership" of the pipeline sufficient to escape the bright line Rule enunciated in Robins-TESTBANK. This court is vested with jurisdiction pursuant to the Outer Continental Shelf Lands Act, 43 U.S.C., §1331 et seq.

Counsel for the plaintiffs rely predominantly on Domar Ocean Transportation Ltd. v. M/V ANDREW MARTIN, 754 F.2d 616 (5th Cir. 1985) arguing that in the present case, Marathon is in a position similar to that of the plaintiff in ANDREW MARTIN, and Marathon like Domar Ocean Transportation Ltd. should recover for their alleged economic loss stemming from the damaged pipeline.

In ANDREW MARTIN, the plaintiff, owner of a barge, the DOMAR 7001, chartered the tug CINDY CENAC to tow DOMAR 7001. Although the tug was owned by Cenac Towing Company, the plaintiff had installed a raised pilot house on the tow so that it could be used in conjunction with the DOMAR 7001. While the two vessels were on their way to Tampa, Florida, the DOMAR 7001 was struck and rendered inoperable and forced to undergo repairs. While the barge was being repaired, the CINDY CENAC was subchartered by the plaintiff, but the plaintiff's earnings under the subcharter were less than it would have earned had the DOMAR 7001/CINDY CENAC combination been functional. The plaintiff sued for the difference between the amount of money it

received under the subcharter and the amount it would have received had the DOMAR 7001/CINDY CENAC combination been functional.

The Fifth Circuit explained that the plaintiff, after installing a raised pilot house on the CINDY CENAC, offered its customers the use of the DOMAR 7001 and the CINDY CENAC as a unit, not as two individual vessels. Therefore, since the vessels operated as an integrated unit, the Fifth Circuit held that the plaintiff had the requisite property interest in the combination so as to permit its recovery for the loss of the unit (for the loss of the DOMAR 7001 and the CINDY CENAC).

Marathon argues that the platform and pipeline facilities and the twenty (20")

inch TETCO pipeline "indisputably ... functioned as an integrated unit", ANDREW MARTIN at 619, and further that the expenditure by Domar in installing a raise pilot house aboard the CINDY CENAC is analogous to the advance payment agreement between Marathon and TETCO regarding exploration in the field and the subsequent construction of platforms and pipelines.

Marathon fails to recognize that in ANDREW MARTIN, Domar clearly sustained damage to a proprietary interest - the DOMAR 7001. Therefore, the bright line, created by the rule of Robins-TESTBANK was crossed in ANDREW MARTIN. In the case at hand, Marathon freely admitted that in bringing the claim for loss of production, it sustained no physical damage to any

property owned by Marathon.

Additionally, as is pointed out by the defendants, the case at hand, unlike ANDREW MARTIN does not involve the joinder of two pieces of property by one business enterprise to form a working whole used exclusively by Marathon to perform a business function. TETCO's twenty (20") inch pipeline was designed to be used by more than just Marathon. In fact, at the time of the rupture, Exxon was also processing gas through the twenty (20") inch TETCO pipeline.

In addition to its "integration" argument, Marathon argues that at the time of the rupture, it lost property in the form of liquids and liquefiable hydrocarbons that were in the pipeline

along with thirty (30) million cubic feet of natural gas.

Marathon has not made a claim for the loss of these liquid and liquefiable hydrocarbons. However, Marathon argues that its (alleged) ownership of the liquid and liquefiable hydrocarbons further shows that Marathon had a functional ownership interest in the damaged TETCO line. Evidence at trial showed that in accordance with the gas purchase contracts between Marathon and TETCO, ownership of the gas passed to TETCO at the inlet of TETCO's meter which is located on South Pass 89B. Once the gas reached the shore, Marathon had the option or right to remove liquefiable hydrocarbons from the gas and thereby take ownership of the hydrocarbons

only insofar as said extraction would not reduce the BTU content of the gas to substandard quality levels, as specified in the gas purchase contract. Marathon did not have an ownership interest in the gas which passed through TETCO's twenty (20") inch pipeline.

The Marathon platform and the TETCO pipeline in the case at hand were no more integrated than the bridge and railroad involved in the Fifth Circuit's decision in Louisville & N.R. Co. v. M/V BAYOU LACOMBE, 597 F.2d 469 (5th Cir. 1979). In BAYOU LACOMBE, the defendant corporation operated a vessel which struck a swing-span railroad bridge over the Tennessee River in Decatur, Alabama, causing the Louisville and Nashville Railroad Co., (Louisville) to

reroute its trains until repairs to the bridge were completed. Louisville sued for damages claiming that since it had a contractual right to use the bridge and contributed to the upkeep of the track, it had an interest sufficient to constitute a property right under the law of Alabama and therefore, recovery should not be barred by the Robins decision. The Fifth Circuit stated:

> Even if the Alabama Courts would classify the plaintiff's rights in the bridge as a form of property interest created by virtue of its contract with the owner, that interest would form too slender a reed upon which to base a right of recovery despite Robins

id. at 473. The Fifth Circuit also noted that Louisville had no obligation to repair the bridge or contribute to the cost of repairs once the bridge was damaged by a

third party and further, that Louisville in fact, did not contribute in repairing the bridge. Since Louisville did not have a proprietary interest in the bridge, the Fifth Circuit affirmed the district court in its granting of the summary judgment motion of the defendants.

Similar to the BAYOU LACOMBE case, in the case at hand, Marathon has the right to use the TETCO twenty (20") inch pipeline, but it does not have a proprietary interest in the pipeline or incidents of ownership at the level required to escape the Robins-TESTBANK prohibition. Additionally, Marathon made no contribution (for which it was not reimbursed by TETCO) toward upkeep or maintenance of TETCO's twenty (20") inch pipeline nor did Marathon contribute to the

cost of repairs to the ruptured pipeline.

In TESTBANK, the Fifth Circuit adopted a bright line rule by formulating the Robins rule as "physical damage to a proprietary interest [is] a prerequisite to recovery for economic loss in cases of unintentional maritime tort." TESTBANK at 1020. The court reasoned that the predictability of the rule outweighed the fact that it can lead to results "at its edge that are said to be 'unjust or unfair'" id at 1029. Additionally, the court explained that most of the economic losses could be covered by first party or loss insurance which is less costly than and preferable to liability insurance and concluded that "denying recovery for pure economic losses is a pragmatic limitation

on the doctrine of foreseeability, a limitation [the Fifth Circuit found] to be workable and useful." Id at 1032. Since, in the case at hand, Marathon has not sustained injury to a proprietary interest as contemplated by the Robins-TESTBANK rule and the facts of the present case do not place Marathon in the same position as Domar was in Domar Ocean Transportation Ltd. v. M/V ANDREW MARTIN, 754 F.2d 616 (5th Cir. 1985), the motion of defendants pursuant to Fed. R. Civ. P. 41(b) is hereby GRANTED dismissing the claims of Marathon Oil Company for deferred oil and gas production for the period during which the twenty (20") inch TETCO line was out of commission.

**APPENDIX B**

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

TEXAS EASTERN TRANSMISSION CO.

V.

McMoRAN OFFSHORE EXPLORATION CO., ET AL

CIVIL ACTION NO. 83-1584
and consolidated cases

SECTION "E/2"

September 16, 1987

**FINDINGS AND CONCLUSIONS**

Texas Eastern Transmission Corporation (TETCO), owner of a 20-inch natural gas pipeline installed on the floor of the Gulf of Mexico, brought suit for damage which was sustained to a portion of its pipeline on January 1, 1983. Made defendants were McMoRan Offshore Company (McMoRan), Faustug Marine Corporation (Faustug), John E. Chance & Associates (Chance), Ocean Drilling and Exploration Company (ODECO), and three tugs, Z/P CHALONE, Z/P CAYMUS and Z/P CONDON, operated by Faustug. This suit and the accident subject of this suit caused a substantial maze of litigation which will be explained below after the details of the disaster are set forth.

## DETAILS OF DISASTER

> After a misfortune has happened, it is easy to see how it might have been avoided. Goslee v. Shute's Executor, 59 U.S. (18 How.) 463, 466 (1855).

On November 11, 1982, Superior Oil Company (hereinafter "Superior") and Pennzoil Company (hereinafter "Pennzoil") assigned their right to use ODECO's semi-submersible drilling rig, D/B OCEAN TRAVELER to McMoRan. At the time of the assignment, the D/B OCEAN TRAVELER was located in the Gulf of Mexico in Block 316 Eugene Island Area. Pennzoil assigned the D/B OCEAN TRAVELER to McMoRan for the drilling and completion of a well in Block 107 West Delta Area in the Gulf of Mexico off the coast of the State of Louisiana and also entered into a farmount agreement.

wherein Pennzoil retained a 34% ownership interest in the lease of Block 107 West Delta Area. Therefore, the D/B OCEAN TRAVELER had to be moved from Block 316 Eugene Island Area to Block 107 West Delta Area. In preparation for the move, McMoRan and Pennzoil on behalf of McMoRan procured the necessary towing services, surveying services, anchor handling services and various other services.

The tugs Z/P CAYMUS, Z/P CHALONE and Z/P CONDON owned by Tractug Associates (Tractug) and operated by Faustug were initially retained by Pennzoil to tow the D/B OCEAN TRAVELER to West Delta Block 107. Once the anchors were racked on the D/B OCEAN TRAVELER in Block 316 Eugene Island Area in preparation for the move, McMoRan

had the opportunity to replace the Faustug towing package. In the event McMoRan chose another towing company, McMoRan would have to pay for demobilization of the Faustug vessels and mobilization of additional towing vessels to replace the Faustug vessels. McMoRan chose to retain the services of Faustug.

The anchor boat, M/V MUSTANG ISLAND, owned by Arthur Levy Enterprises, Inc. (hereinafter "Arthur Levy") was used in raising and racking the anchors at the Pennzoil location as well as to set the anchors at the McMoRan location in Block 107 West Delta Area. An anchor handling crew from International Mooring & Marine[2]

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[2] International Mooring & Marine is not a party to this lawsuit nor is any employee of International

(I M & M) worked on board the anchor boat in connection with the handling of the anchors.

On December 7, 1982, McMoRan hired Chance to perform the services of a survey outfit to assist in moving the D/B OCEAN TRAVELER onto location and to assist in stabilizing the rig over the drill site in Block 107 West Delta Area. Chance had the responsibility to evaluate the intended rig site and offer information and recommendations pertinent to the rig site.

On the morning of December 28, 1982, Z/P CONDON was made fast to the starboard inboard tow line and Z/P CAYMUS was made fast to the port outboard tow line. Z/P

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Mooring & Marine.

CHALONE was also fast to the D/B OCEAN TRAVELER, acting as lead tug. Equipment was offloaded from the rig at this time. The rig was ballasted and the anchors lifted. During this time, Pennzoil representatives departed the rig and around 0200 hours on December 28, 1982, Bobby Craft, a representative of McMoRan, boarded the D/B OCEAN TRAVELER. The move began around 0200 hours on December 29, 1982.

On December 30, 1982, M/V ATLANTIC SURVEYOR (the Chance survey boat) departed Fourchon, Louisiana for the intended location in Block 107 West Delta Area. The survey party included Glenn Miller as party chief, Rodney Frederick as captain, and instrument men, Ronald Smith, Richard Eisle and Randy Menard. Upon arrival in block

107, the M/V ATLANTIC SURVEYOR dropped the instrument men off at three fixed platforms - Menard at Marathon Platform 86A; Eisle at Marathon Platform 109A; and Smith at Shell Platform 104D. By approximately 2300 hours on December 30, 1982, the M/V ATLANTIC SURVEYOR had dropped the location buoys and the anchor buoys in Block 107 marking the drill site and the location where the D/B OCEAN TRAVELER's eight anchors were to be dropped.

At approximately 1700 hours on December 31, 1982, the tow stopped about three miles from the proposed location (commonly referred to as the "staging area") to permit the tugs to shorten their tow lines from 1700 feet to about 1/2 that length. For greater maneuverability the

M/V MUSTANG ISLAND was given pendant wire to the No. 6 and No. 7 anchor buoys.

Aboard the D/B OCEAN TRAVELER in addition to Mr. Craft, was barge engineer, Norman L. "Sleepy" Terrebone, who had relieved Wayne "Bebop" Gregory at approximately 1030 hours December 31, 1982 while the rig was under tow. Among others aboard the D/B OCEAN TRAVELER was Lee J. Trahan as the toolpusher and David Stogner, the ODECO rig superintendent.

After the tow lines were shortened, Sleepy Terrebone requested the survey vessel, M/V ATLANTIC SURVEYOR, to stand by the marker for the No. 6 anchor location and requested the anchor boat, M/V MUSTANG ISLAND, to stand by the No. 7 anchor. The D/B OCEAN TRAVELER passed between the No. 6

and No. 7 anchor buoys (referred to as the "gate buoys") and dropped its No. 6 and No. 7 anchors. It is customary procedure to drop one or two of the rig's stern anchors as the rig passes through the gate buoys. The rig's two anchors act as a brake to assist in slowing the rig to a halt on or near the proposed well site. After the anchor boat places the other six anchors in their specified location, the anchor boat returns to the No. 6 and No. 7 anchors and places them in their specified positions.

As the D/B OCEAN TRAVELER passed through the "gate buoys" on December 31, 1983, it dropped the No. 6 anchor off the starboard stern at approximately 2100 hours and paid out between 1500 and 2000 feet of chain. At approximately 2110 hours, anchor

No. 7 was dropped off the port stern and approximately 1000 to 1200 feet of anchor chain was paid out to it.

After the No. 6 and No. 7 anchors had been dropped, the captain of the anchor boat, Paul S. Percle, informed the D/B OCEAN TRAVELER that the anchor boat could not continue operations due to severe weather conditions. Severe weather caused the buoys to disappear, which precluded the anchor boat from running the rig's anchors out to their specified locations and the seas became too rough to permit the crew to perform the anchor operations on the 168 foot boat, M/V MUSTANG ISLAND.

After the anchor handling operation had been discontinued, the rig personnel decided ~~to stay~~ on location and wait for

the storm to end. Terrebone inquired if the Faustug vessels could hold the rig on a 090 heading (due east) into the wind and in position. The Faustug vessels replied they could do so.

At approximately 2130 hours on December 31, 1982, Terrebone asked for a "position shot" to determine the location of the rig and the party chief aboard the M/V ATLANTIC SURVEYOR responded that the auto tape aboard the vessel was inoperable and the M/V ATLANTIC SURVEYOR would not be able to inform the rig of its precise location.

Throughout the evening of December 31, 1982 Terrebone inquired whether the Faustug vessels were able to hold the rig on the 090 heading into the wind and seas.

Terrebone also told the tugs that if needed, the rig could drop the No. 2 and No. 3 anchors in order to assist the tugs in holding the position of the rig. The Faustug vessels responded that they would be able to keep the rig on a 090 heading and that dropping the No. 2 and No. 3 anchors wold not be necessary.

Additionally, Steven F. Punchard, the control room operator aboard the D/B OCEAN TRAVELER, contacted the lead tug, Z/P CHALONE approximately every two hours to monitor the position of the rig during the night of December 31, 1982 and the morning of January 1, 1983. He was informed that the rig was being held in position on the 090 heading.

At approximately 0100 hours on January 1, 1983, the M/V ATLANTIC SURVEYOR received an operable set of auto tapes, but apparently did nothing with them.

At approximately 0140 hours on January 1, 1983, the tow line of the Z/P CAYMUS parted at the bulwark. The parting occurred where chafing gear is normally placed on the tow line to prevent the tow line from parting. Sleepy Terrebone spoke with the lead tug after the line parted and inquired whether the tugs (without the assistance of the Z/P CAYMUS) could hold the rig in location on the 090 heading and whether the rig should drop the bow anchors to help stabilize the rig's location. The lead tug responded, stating that it would not be necessary for the rig to drop its

bow anchors and that the rig would still be held on or near location on the 090 heading.

At approximately 0430 hours January 1, 1983, the Z/P CAYMUS passed a mooring line off its stern to the M/V MUSTANG ISLAND so the MUSTANG ISLAND could assist in turning the D/B OCEAN TRAVELER into the wind and seas. At 0500 an entry was made in the log book of the D/B OCEAN TRAVELER by Sleepy Terrebone. The entry states, "Holding rig 090 into the wind and sea. Survey boat said in area of location." The "log book" shows that the original entry at 0500 was clearly erased and written over in a darker pencil lead, perhaps at a different time. For this reason, I cannot conclude that the survey boat told the rig it was

still in the area of location at 0500 on January 1, 1983.

At approximately 0530, Robert Craft told an ODECO employee to contact the survey boat to determine the location of the rig. Either Sleepy Terrebone or Lee Trahan reported to Craft that the survey boat stated that the rig was three to four miles west of location. Finding it hard to accept that the rig had moved three to four miles in a westerly direction with two anchors weighing approximately 30,000 pounds each and with the aid of three tugs, both the ODECO personnel and Mr. Craft believed that Chance had placed the rig in the wrong Block on the previous night.

At approximately 0745 hours, January 1, 1983, the D/B OCEAN TRAVELER began to pull

in the No. 7 anchor chain with the assistance of the anchor boat, M/V MUSTANG Island.[3] By 1130 hours, January 1, 1983, the No. 7 anchor was successfully bolstered to the D/B OCEAN TRAVELER.

Once the No. 7 anchor was bolstered Sleepy requested that the anchor boat "chase out" the anchor chain because the No. 6 anchor flag was no longer visible.

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[3] Each anchor was attached by a 2" inch diameter chain to a windlass aboard the rig. Also attached to each anchor was a pendant line which was secured to an anchor buoy. Normally, in order to raise or lower an anchor, the anchor boat retrieves the buoy on board, then attaches the pendant line to its own wench and raises the anchor from the bottom. The windlass aboard the rig is used to take on or let out the chain while the anchor boat is handling the anchor.

The anchor boat would not chase out the chain because it feared the No. 6 anchor buoy had sunk into the Gulf and if the anchor boat were to run over the buoy, the anchor boat would sustain damage.

Instead, the M/V MUSTANG ISLAND made up to the port stern of the D/B OCEAN TRAVELER to assist the rig in "walking back" toward the location of the No. 6 anchor. The Faustug vessels reduced power at the bow of the rig and the windlass on the rig was used to pull in the anchor chain until the D/B OCEAN TRAVELER was positioned over the NO. 6 anchor. The winching would continue in an attempt to unseat the anchor. The rig personnel experienced substantial difficulty in attempting to unseat the No. 6 anchor. The anchor windlass on board the

rig was brought up to a maximum power of 600 amps and would overheat. As the motor overheated, the automatic shut down on the motor would engage and "cut out".

Sometime between 1500 and 1600 hours, January 1, 1983, Craft, the McMoRan representative aboard the D/B OCEAN TRAVELER, decided to have operations shut down in order to determine if there were any pipelines in the area. Craft met with ODECO's Trahan, Stogner, and Terrebone to discuss the possibility of the No. 6 anchor being hooked on a pipeline. All persons involved knew the rig was in the southwest corner of Block 106, that a pipeline ran 500 feet west of the Block 105/106 border, and that the anchor had approximately 600 feet to chain out. At the meeting, the

ODECO people explained to Craft that in the past they had experienced similar troubles raising anchors in the Block 106 West Delta Area because the bottom in that area is known for its silt and "gumbo" texture which permits deep anchor penetration and causes difficulty in anchor retrieval. After this meeting it was the consensus of those on board the D/B OCEAN TRAVELER that retrieval of the No. 6 anchor should begin again.

At approximately 1735 hours, a large black mushroom cloud erupted from the Gulf of Mexico off the D/B OCEAN TRAVELER's starboard stern. The rig's No. 6 anchor had ruptured TETCO's 20-inch natural gas pipeline, spilling 30 million cubic feet of gas under 1150 pounds per square inch

pressure into the atmosphere.

Since the chain to the No. 6 anchor remained taught after the rupture, the D/B OCEAN TRAVELER was moving toward the white water aeration caused by the gas from the TETCO line. Those on board the rig attempted to slack off the wench in order to get the rig away from the gas fearing that exhaust from the rig would cause the gas to ignite.

At approximately 1800 hours on January 1, 1983, the No. 6 anchor chain was cut with about 400-500 feet of anchor chain out. The Faustug vessel then began the attempt to return the D/B OCEAN TRAVELER to the original location in Block 107 West Delta Area. Six lawsuits emanated from the above described accident. The cases were

consolidated and tried in this Court. A description of said cases is as follows:

TEXAS EASTERN TRANSMISSION COMPANY V. MCMORAN, ET AL
CIVIL ACTION NUMBER 83-1584

TETCO, the owner of the 20-inch natural gas pipeline that was ruptured brought suit against McMoRan Offshore Exploration Company. Faustug, Chance, ODECO and in rem actions against the tugs Z/P CHALONE, Z/P CONDON and Z/P CAYMUS, claiming that on or about January 1, 1983, while the D/B OCEAN TRAVELER was under the care, custody and control of all aforementioned parties, the rig dropped its stern anchor (No. 6) which struck and severed its 20-inch natural gas pipeline.

McMoRan filed a third-party complaint against Chance alleging that the surveying

services of Chance were being performed pursuant to a written agreement between Chance and Pennzoil acting on its own behalf and on behalf of McMoRan and that pursuant to the provisions of said agreement, McMoRan is entitled to be indemnified and held harmless by Chance for all claims arising out of the casualty, subject of this suit. McMoRan also filed a third-party complaint against Fidelity & Casualty Company of New York, National Surety Corporation, Insurance Company of North America, Citadel Insurance Company, Underwriters at Lloyds and Insurance Companies in London and United States Fire Insurance Company alleging that said insurers had Protection and Indemnity (P & I) and/or excess policies covering Chance.

McMoRan also filed a third-party demand against Continental Insurance Company (Continental) alleging that Continental had in force a primary and excess policy covering Faustug and Continental should be required to indemnify and defend McMoRan.

Tractug Associates and Faustug have filed a third party complaint against Arthur Levy,[4] in its capacity as owner and operator of the anchor boat the M/V MUSTANG ISLAND. Arthur Levy was not named as a direct defendant by TETCO. Tractug and Faustug along with their insurer,

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[4] Although the third-party demand was brought on behalf of Tractug and Faustug, only Faustug was named as a defendant by TETCO. Faustug was the operator of the three tugs while Tractug was the owner of the three tugs.

Continental, have filed cross-claims for indemnity and/or contribution against Chance, ODECO, McMoRan, Fidelity and Casualty Company of New York, National Surety Corporation, Insurance Company of North America, Citadel Insurance Company, Underwriters at Lloyds and Insurance Companies in London, and United States Fire Insurance Company.

ODECO has filed claims for indemnification and/or contribution against McMoRan, Chance, Fidelity and Casualty Company of New York, National Surety Corporation, Insurance Company of North America, Citadel Insurance Company, Underwriters at Lloyds and Insurance Companies in London and United States Fire Insurance Company, Arthur Levy and

Continental. ODECO has also sued Liberty Mutual Insurance Company as the general liability and contractual liability insurer of McMoRan. Additionally, ODECO has tendered Continental as a direct defendant to both TETCO and Marathon.

Arthur Levy has filed a counter-claim against Faustug.

The insurers, Fidelity and Casualty Company of New York, National Surety Corporation, Insurance Company of North America and Citadel Insurance Company have filed claims against ODECO alleging there is no coverage provided for the claims of ODECO and therefore these insurers are entitled to recover attorney's fees from ODECO.

United States Fire Insurance Company has filed claims for indemnification and/or contribution against McMoRan and ODECO.

FAUSTUG AND TRACTUG PETITION FOR EXONERATION FROM OR LIMITATION OF LIABILITY CIVIL ACTION NUMBERS 83-3236; 83-3237 AND 83-3238

After TETCO filed its complaint in 83-1584, Tractug and Faustug, in their capacities as the owners and operators of the Z/P CHALONE, Z/P CONDON and Z/P CAYMUS, petitioned for exoneration from and/or to limit their liability with regard to aforesaid vessels. Tractug and Faustug filed a separate complaint for each vessel and along with their insurer, Continental, filed Ad Interim stipulations of $3,290,362.33 for the Z/P CHALONE; $3,290,362.23 for the Z/P CONDON, and

$3,940,362.33 for the Z/P CAYMUS, binding themselves, jointly, severally and in solido for the payment of said amounts. The Ad Interim stipulations have accrued interest at the rate of 6% per annum since June 29, 1983. TETCO, McmoRan, Chance and ODECO answered and filed claims in the limitation proceedings filed on behalf of Tractug and Faustug.

MARATHON ET AL CLAIM FOR DAMAGE
TO 12-INCH PIPELINE
CIVIL ACTION NO. 83-6274

Marathon Oil Company, Hess Pipeline Company, and The Louisiana Land and Exploration Company filed a complaint against McMoRan, Faustug, ODECO, the tugs and the D/B OCEAN TRAVELER for costs and expenses incurred in the inspection, testing and preservation of a 12-inch

pipeline running near and parallel to the TETCO 20-inch pipeline that was ruptured. (Civil Action No. 83-6247). Damage to the 12-inch pipeline was sustained when an anchor of the D/B OCEAN TRAVELER was dragged over the pipeline.

MARATHON ET AL CLAIM FOR LOSS OF PRODUCTION CIVIL ACTION NO. 83-6275

Marathon also filed Civil Action No. 83-6275 claiming damages for "loss of production" allegedly sustained by it as a result of the ruptured 20-inch TETCO line.

All six cases were consolidated and tried on the issue of liability on prior dates. The claim of Marathon for loss of production (CA No. 83-6275) has been dismissed by this Court pursuant to Fed.R.Civ.P. 41(b). (See Record Documents

293 and 301). The claim of Marathon for costs and expenses incurred in the inspection, testing and preservation of the 12-inch pipeline, Civil Action No. 83-6274, has been settled among the parties.

Prior to trial of the remaining TETCO claim (and the three claims in limitation) TETCO entered into a settlement agreement with ODECO, Faustug, Tractug and Continental wherein the aforesaid parties paid TETCO $9,501,184.72 in return for a release from TETCO and an assignment of TETCO's rights in this litigation. Armed with said assignment, ODECO, Faustug, Tractug and Continental have pursued TETCO's claims against all remaining parties as well as their own claims in their respective capacities. This Court is

faced with the onerous task of first, apportioning fault among the many players, all pointing fingers at the "other guy"; second, ruling on the various alleged indemnity agreements by and between various parties; thirdly, determining whether McMoRan enjoys the status of "additional assured" on a policy of insurance issued to Pennzoil by Continental and, finally, whether Continental is in bad faith for failing to provide coverage to McMoRan as an additional assured and further by filing a claim against McMoRan for indemnity and/or contribution and pursuing McMoRan in accordance with the assignment by TETCO.

## FAULT OF THE PARTIES[5]

To say the least, the move of the D/B OCEAN TRAVELER was not performed very professionally, as the ruptured 20-inch pipeline so vividly illustrates. Nearly every party to the operation was at fault in causing the rupture, for a little amount of perception and effort on the part of any party to the move could have easily prevented it. As explained below, the fault in the case is to be allotted among Faustug, ODECO, McMoRan and Chance, who

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5 When two or more parties have contributed by their fault to cause property damage in a maritime collision, liability for such damage is to be allocated among the parties proportionately to the comparative degree of their fault. United States v. Reliable Transfer Co., Inc., 421 U.S. 397, 411 (1975).

were in a position to prevent the accident had one of them exercised requisite reasonable care.

FAUSTUG

After the rig had dropped its two stern anchors and operations were shut down because the anchor boat, M/V MUSTANG ISLAND, could not operate in such severe weather, personnel aboard the rig expressed concern whether the tugs would be able to hold the rig into the wind and in the area of location. However, as evidence at trial proved, the rig actually moved or was caused to move in a direction westward from location in Block 107 to Block 105 approximately 3.5 miles from location. The tugs continually reassured the rig that it was being held on a 090 heading in the area

of location. Additionally, the testimony by deposition of Steve Punchard, the rig's control room operator, shows that Mr. Punchard contacted the Faustug vessels every two hours throughout the evening of December 31, 1982 and the early morning hours of January 1, 1983 and informed the tugs that the rig's bow anchors could be dropped in the event that the tugs were not able to hold the rig in position. However, the rig was repeatedly informed by the tugs that they were successful in holding the rig into the wind and on or about location and the dropping of additional anchors would not be necessary.

Although the rig moved 3.5 miles through the evening of December 31 and the morning of January 1, the tugs were unaware

of the movement. Had the tugs, through the evening of December 31, 1982 and the early morning of January 1, 1983, plotted their positions at regular intervals based on their LORAN-C units or by use of their radar, they would have been aware of the rig's movement and could have alerted the rig personnel who could have dropped additional anchors to prevent further movement into the area where TETCO's 20-inch natural gas pipeline was located. Additionally, the rig was not held by the tugs on a 090 heading into the wind, even though the tugs repeatedly told the rig that the 090 heading remained fixed. This exposed a side of the rig to strong winds and storm and facilitated the rig's westward movement. Throughout the rig's

movement in a westerly direction from Block 107 to Block 105, the tugs knew the No. 6 and No. 7 rig anchors were down and therefore had a greater duty to keep the rig on location to prevent the obvious dangers created by a rig dragging two anchors weighing approximately 30,000 pounds each. All of these acts of negligence on the part of Faustug, as operator of the Z/P CAYMUS, Z/P CHALONE and Z/P CONDON, contributed to and caused the rupture of TETCO's 20-inch pipeline.

Additionally, I find that the tugs were unseaworthy and their unseaworthiness was also a proximate cause of the damage to TETCO's 20-inch pipeline.

The owner of a vessel is not required to provide an accident free ship, but he

must provide a vessel and appurtenances on that vessel that are reasonably fit for their intended use. Mitchell v. Trawler Race, Inc., 362 U.S. 539 (1960). Also, the owner of a vessel is obligated to provide a vessel with proper working appliances and equipment. Id.

Evidence at trial showed that the lead Tug, M/V CHALONE was unseaworthy because it failed to have a properly functioning LORAN-C unit on board. The lack of this unit prohibited the tug from properly plotting the location of the rig and tugs throughout their westward movement. A functioning LORAN or the proper use thereof could have alerted all to the rig's westward movement and prevented the accident from occurring.

Evidence also established that the tow line of the Z/P CAYMUS parted at approximately 0140 hours on January 1, 1983, because the appropriate chafing gear was not in proper place on the tow line. With chafing gear in the proper location, the tow line would have been less likely to part and with three tugs instead of two it would have been less likely that the rig would have presented its side to the strong wind which facilitated the rig's westward movement.

It is well established that the incompetence of a crew can render a vessel unseaworthy. Orient Mid-East Lines v. A Shipment of Rice, 496 F.2d 1032 (5th Cir. 1974). Many of the crew members aboard the Faustug tugs were engaged in their first

towing operation of this magnitude. When engaged in this type of rig move, Faustug owes a duty to provide personnel more experienced than those provided on this particular towing operation. The inexperience of the tugs' crew rises to the level of incompetence that amount to creating unseaworthy vessels. A seasoned crew would have been more likely to take notice of the rig's westward movement by use of radar or satellite navigation units and would have taken steps in an attempt to prevent said movement.

ODECO

The negligence of ODECO is rather obvious. ODECO owned and manned the D/B OCEAN TRAVELER. Aboard the rig during the move from Block 316 Eugene Island Area to

Block 107 West Delta Area where, among others, Norman Leon "Sleepy" Terrebone, an experienced barge engineer, operating as rig mover, Lee Trahan, the senior ("day") tool pusher and David Stogner, a drilling superintendent. On the morning of January 1, 1983 after the No. 7 anchor had been successfully bolstered, Bobby Craft, representative of McMoRan, requested that the retrieval of the No. 6 anchor cease. Once the retrieval stopped, Craft met with Terrebone, Trahan and Stogner to discuss the possibility of a pipeline being in the area and interfering with the retrieval of the No. 6 anchor. During the discussions about the difficulty in unseating the No. 6 anchor, the ODECO personnel informed Craft that they had encountered similar

problems in that area of the Gulf before. The ODECO personnel informed Craft that the bottom in that area is known for its "gumbo" or "silty" bottom which permits deep anchor penetration and creates difficulty in anchor retrieval. Evidently, the ODECO personnel were able to convince Craft that retrieval of the No. 6 anchor should recommence. The decision to recommence retrieval was a joint decision of all participants in the discussion. Unfortunately, the decision proved to be imprudent as the ruptured pipeline illustrates. The ODECO personnel and the McMoRan representative made this decision with the knowledge that the rig had drifted from Block 107 westward to the southwest corner of Block 106, that the No. 6 anchor

had approximately 600 feet of chain out and that there existed a pipeline approximately 500 feet inside (West) of the Block 105/106 border.

Although aboard the rig were a number of seasoned ODECO personnel not one suggested that operations be suspended until it could be determined whether anchor No. 6 was hooked on a pipeline or another underwater obstruction.

MCMORAN

Although there are numerous allegations of fault on the part of McMoRan (predominantly alleged by ODECO), none have merit except for the contention that in exercising his right to intervene, Mr. Robert Craft did so in an imprudent fashion. Although Craft was the first

individual aboard the rig to exercise care in requiring retrieval operations on anchor No. 6 to be shut down, he was negligent in deciding (along with ODECO personnel) that retrieval of the No. 6 anchor should recommence. Mr. Craft possessed the same information as did the ODECO personnel- that the rig was in the southwest corner of Block 106; that the No. 6 anchor had approximately 600 feet of chain out; and that there existed a pipeline approximately 500 feet inside of the Block 105/106 border. Accordingly, Craft was just as negligent as the ODECO personnel and Crafts negligence, as was ODECO's negligence, is a proximate cause of the damage sustained to TETCO's 20-inch natural gas pipeline.

ODECO alleges that McMoRan should be held at fault for violations of regulations that the Secretary of the Interior has promulgated under the Outer Continental Shelf Lands Act, 43 U.S.C. §1331 et. seq. which concern the duty of a lessee to maintain safe and workmanlike conditions:

> (a) The lessee shall perform all operations in a safe and workmanlike manner and shall maintain all equipment in a safe condition for the protection of the lease and associated facilities, for the health and safety of all persons, and for the preservation and conservation of property and the environment.
>
> (b) The lessee shall immediately take all necessary precautions to control, remove, or otherwise correct any hazardous oil and gas accumulation or other health, safety, or fire hazard.

30 C.F.R. §205.46.

The law of the Fifth Circuit makes it clear that ODECO's contention lacks merit:

> This regulation [30 C.F.R. 205.46] does not make lessees insurers of their work areas. Copeland v. Gulf Oil Corp., 672 F.2d 867, 868 n. 2 (11th Cir. 1982). The act does not 'impost liability upon a lessee based upon violation of a departmental regulation when that lessee is admittedly free from fault'. Olsen v. Shell Oil Co., 561 F.2d 1178, 1189 (5th Cir. 1977). A breach of the regulation provides no federal civil cause of action. Id. Furthermore, these regulations are in no way analogous to safety regulations which require a specific standard of conduct in particular situations', and establish no special standard of care in a negligence action. Bourg v. Texaco Oil Co., 578 F.2d 1117, 1120 (5th Cir. 1978).

Creppel v. Shell Oil Company, 738 F.2d 699, 702 (5th Cir. 1984).

Additionally, in Bourg v. Texaco Oil Co., 578 F.2d 1117, 1121 (5th Cir. 1978) the court held that the regulations do not

create a form of vicarious liability for the acts of an independent contractor.

ODECO also asserts that McMoRan should be held liable for hiring incompetent independent contractors. Assuming arguendo that some of the independent contractors hired by McMoRan were incompetent no evidence at trial tended to show that said incompetence was known by McMoRan. Additionally, a principal who hires independent contractors over which he exercises no operational control, has no duty to discover and remedy hazards created by its independent contractors. Wallace v. Oceaneering International, 727 F.2d 427 437 (5th Cir. 1984).

Finally, I find the claims by ODECO that employees of McMoRan involved in the

company's shoreside operations were negligent in failing to provide weather and any other information to the rig lack merit.

CHANCE

Counsel for Chance takes the position that all allegations against Chance are attempts to impose liability upon the survey company for duties that were outside the scope of its performance under its contract with McMoRan. Chance argues that the rig personnel could not reasonably rely upon the survey vessel standing by location three and one-half miles away from the ruptured pipeline to accurately monitor its position, the position of its anchors and where the anchors were in respect to the location of the pipeline.

Chance correctly points out that even assuming that it had a duty to inform ODECO of the rig's location on the morning of January 1, 1983 prior to the rupture, such information would not have made a bit of difference. As previously explained, prior to deciding to recommence the retrieval of anchor No. 6 the McMoRan representative, Craft, and the ODECO personnel all possessed the information relating to rig location and pipeline location. Had this information been supplied by Chance to those on board the rig, it is likely the decision to retrieve the No. 6 anchor would still have been made.

However, I do find negligence on behalf of Chance which was a proximate cause of the rupturing of the 20-inch pipeline. As

previously mentioned, the D/B OCEAN TRAVELER came on to location on December 31, 1982 when it dropped its two stern anchors. The M/V ATLANTIC SURVEYOR, operating as a survey boat had dropped an instrument man at Marathon Platform 86A (Randy Menard); at Marathon Platform 109A (Richard Eisle); and at Shell Platform 104D (Ronald Smith) and was waiting to assist the D/B OCEAN TRAVELER once the rig approached location. After the rig's stern anchors had been dropped and the anchor running operations had been shut down awaiting better weather, those aboard the M/V ATLANTIC SURVEYOR and the three instrument men aboard the various platforms observed the movement of the D/B OCEAN TRAVELER from in the area of location

westward out of sight. Obviously, Chance knew the rig was moving and also knew that those on board the rig as well as the crew on the Faustug tugs did not intend to permit the rig to move off of location. It was a well known fact to all that the instructions given by the rig to the tugs was to hold the rig on a 090 heading in position at location in Block 107 West Delta Area. However, given this knowledge, every one on board the M/V ATLANTIC SURVEYOR and all three of the instrument men on the various platforms remained stone silent. Once the rig was moved on to location, Chance owed the duty to see that the rig was properly positioned on location over the intended drilling site. Chance argues that once the anchor running

operation had ceased due to inclement weather, it no long had any duty to the rig to monitor the rig's position, despite specific requests by ODECO personnel as to the position and movement of the D/B OCEAN TRAVELER. I find that a prudent surveyor, faced with the same facts and conditions that Chance was faced with on December 31, 1982 and January 1, 1983, would have stood up and spoken and told the rig and tugs, "although you intend to remain in the area of location, you are (have drifted) a substantial distance westward", or something of the like in saltier vernacular. The silence of Chance along with its failure to give the rig a "position shot" when specifically asked for constitutes negligence and said negligence

is a proximate cause of the rupturing of the pipeline. Had Chance been more prudent, the rig would have known that, despite the representations made by the tugs, the rig was actually moving westward and could have dropped its bow anchors to prevent further movement or could have told the tugs that they were failing in their mission.

ARTHUR LEVY

Both ODECO and Faustug have filed claims against Arthur Levy, owner and operator of the anchor boat, the M/V MUSTANG ISLAND.

The first allegation of fault on part of Arthur Levy is that the MUSTANG ISLAND's master, Captain Percle, did not inform the rig personnel that the rig was three to

four miles off of location as soon as he knew about it. Evidence at trial showed that Captain Percle learned of the westward movement of the rig at the same time every one else learned, namely, around 0530 hours, when the survey boat reported that the rig was three and one-half miles from location. Assuming arguendo that the anchor boat had the duty to inform the rig of its location,[6] its failure to inform the rig of its location, considering all other evidence herein discussed, clearly is not a proximate cause of the rupturing of the pipeline. For this reason, I find this

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[6] By assuming this arguendo, I do not mean to even suggest that the anchor boat had this duty. On the contrary I see no authority tending to show that the anchor boat owed such a duty.

claim by ODECO and Faustug lacks merit.

The second and final allegations of fault on the part of Arthur Levy is that although Captain Percle advised the rig and tugs of an approaching thunderstorm, as the rig was moving onto location, he did not specifically tell them that if the approaching weather were severe enough, the anchor boat and crew might not be able to handle the anchor running operations. ODECO and Faustug maintain that somehow, Captain Percle's failure to so advise the rig and tugs was a proximate cause of the rupturing of the pipeline. Suffice it to say that this claim made by ODECO and Faustug is extremely speculative at best, highly absurd at worst. Accordingly, I find the second and final claim against

Levy by ODECO and Faustug lacks merit.

APPORTIONMENT OF FAULT

Based on the foregoing reasons, I find the percentage of fault attributable to the acts of the parties in causing the damge to TETCO's 20-inch natural gas pipeline to be as follows:

| | |
|---|---|
| FAUSTUG | 70% |
| ODECO | 10% |
| MCMORAN | 10% |
| CHANCE | 10% |
| LEVY | 0% |

INDEMNIFICATION BETWEEN MCMORAN AND ODECO

In November of 1982 when Superior Oil and Pennzoil assigned the D/B OCEAN TRAVELER to McMoRan for the drilling and completion of a well in Block 107 West Delta Area, the assignment incorporated by

reference a drilling contract with McMoRan assuming all rights, duties and obligation of "Operator" once the D/B OCEAN TRAVELER had all anchors racked and was ready to move from Pennzoil's location in Block 316 Eugene Island Area and continuing until the rig completed the drilling operations and racked all anchors in preparation for a move from Block 107 West Delta Area. The drilling contract was assigned to and accepted by McMoRan.

The assignment also provided that the law governing the agreement shall be the General Maritime Law of the United States. The pertinent provision reads as follows:

> "Whenever the operations contemplated by this Agreement are conducted in, on or above the navigable waters of the United States, including any operations conducted on or above artificial

> islands or fixed structures, the law governing this Agreement shall be the General Maritime Law of the United States."

The drilling contract between McMoRan and ODECO contained, among others, the following indemnity provisions:

> "Operator [McMoRan] agrees that Contractor [ODECO] shall be released and relieved from, and agrees to indemnify, hold harmless and defend Contractor [ODECO] against any and all losses, claims, demands, damages and liabilities resulting from or arising out of damages to wells, pipelines, flowlines and any resulting pollution, or loss of production as a result of moving the drilling unit onto or off of, or operations conducted on, Operator's [McMoRan's] designated location, unless caused by the sole negligence of Contractor [ODECO]." (Art. VII, sub-part D of the Drilling Contract, Exhibit ODECO 19). (Emphasis added).

Exhibit "B" of the Drilling Contract required ODECO to procure certain insurance

coverage and "shall contain a waiver of subrogation in favor of [McMoRan]... for the liabilities assumed by Contractor [ODECO] hereunder: (emphasis added).

Accordingly, if the liability for the damage caused by the rupture of the TETCO 20-inch gas line is a liability assumed by ODECO, the insurance obtained by ODECO should contain a waiver of subrogation in favor of McMoRan. However, if the liability and damage arise as a result of the D/B OCEAN TRAVELER moving onto location (as per terms of the indemnity agreement) McMoRan will be forced to indemnify ODECO unless said damage is held to be caused by the sole negligence of ODECO.

ODECO takes the position that once the D/B OCEAN TRAVELER passed through the gate

buoys and dropped its two stern anchors the rig was in the process of moving onto location as it contemplated in the above quoted indemnity agreement. Accordingly, ODECO argues, the damage to TETCO's 20-inch natural gas pipeline occurred while the D/B OCEAN TRAVELER was in the process of moving onto location and therefore McMoRan should be required to indemnify ODECO for the damages caused by the fault of ODECO. McMoRan takes the position that the damages occurred about 3.5 miles west of location and at the time of the rupture the D/B OCEAN TRAVELER was not moving onto location as is contemplated in the above quoted indemnity provision.

In accordance with General Maritime Law:

> a contract of indemnity should be construed to cover all loses, damages, or liabilities which reasonably appear to have been within the contemplation of the parties, but it should not be read to impose liability for those losses or liabilities which are neither expressly within its terms nor of such a character that it can be reasonably inferred that the parties intended to include them within the indemnity coverage.

Corbitt v. Diamond M Drilling Co., 654 F.2d 329, 333 (5th Cir. 1981), Kemp v. Gulf Oil Corp., 745 F.2d 921, 924 (5th Cir. 1984), Babcock v. Continental Oil Co., 792 F.2d 1346, 1351 (5th Cir. 1986). Additionally, a maritime contract containing an indemnity agreement should be read as a whole and its words given their plain meaning unless the provision is ambiguous. Weathersby v. Conoco Oil Co., 752 F.2d 953, 955 (5th Cir. 1984) citing Lirette v. Popich Bros. Water

Transport, Inc., 699 F.2d 725, 728 (5th Cir. 1983). With these principles in mind, I address the present dispute over the applicability of the indemnity provision.

The language of the indemnity provision requires McMoRan to indemnify ODECO, inter alia, for damage to pipelines, as a result of "moving the drilling unit onto or off of, or operations conducted on Operator's [McMoRan's] designated location, unless [said damage is] caused by the sole negligence of contractor [ODECO]." Therefore, the issue before me is whether the damage caused to TETCO's 20-inch natural gas pipeline occurred as a result of moving the D/B OCEAN TRAVELER on to McMoRan's designated location (the well site in Block 107 West Delta Area).

Evidence at trial clearly showed that on December 31, 1982, the D/B OCEAN TRAVELER moved onto location when it passed through the gate buoys and dropped its No. 6 and No. 7 anchors. Thereafter, due to various forces, the D/B OCEAN TRAVELER ended up approximately 3.5 miles west of location, with its No. 6 anchor engaged in the 20-inch TETCO line. The 'moving onto location' has clearly been interrupted.

McMoRan takes the position that the drilling contract as a whole, shows that the parties intended that McMoRan be liable for damages occurring in the area of location in Block 107. To hold McMoRan liable for damages occurring approximately 3.5 miles from the area of location would run counter to the intent of the parties as

McMoRan sees it. McMoRan points to other provisions of the contract which further this argument. Specifically, the drilling contract contains requirements for the lease operator to determine the condition of the seabed at the drilling locations and to ensure that each location, including the anchor pattern is free and clear of obstacles and obstructions.

The drilling contract also requires the operator to furnish and pay for bottom condition surveys and other expenses in determining the condition of the bottom at each location prior to the contractor's moving onto location and to continue inspecting those conditions under and near the drilling units hulls and anchor pattern while on location. These provisions in the

contract show that it was the intent of the parties that McMoRan, as a lease owner in Block 107 was to be held responsible for damage occurring in the area of location and not for damage occurring 3.5 miles away from location.

Accordingly, I find that the liability for damage occurring 3.5 miles west of location does not reasonably appear to have been within the contemplation of the parties, is not within the express terms of the indemnity provision and it cannot be reasonably inferred that the parties intended to include such liability within the indemnity coverage. Accordingly, ODECO's claim against McMoRan for indemnity in accordance with the above quoted indemnity agreement is without merit. For

the same reasons, ODECO's claim against McMoRan's general liability insurer, Liberty Mutual Insurance Company, is also without merit.

MCMORAN'S CLAIM AGAINST FAUSTUG AND FAUSTUG'S INSURER, CONTINENTAL

On November 1, 1982, Tom Faust, President of Faustug, signed on behalf of Faustug Marine Corporation a blanket towing agreement with Pennzoil. Mr. Faust testified that the job of towing the D/B OCEAN TRAVELER from Eugene Island Block 316 to West Delta Block 107 was conducted under this blanket towing agreement.

In the towing agreement the rights and obligations of the parties are set forth using specific references to "COMPANY" and "CONTRACTOR." "COMPANY" is defined at the outset of the agreement as "Pennzoil

Company, and on behalf of all of its subsidiaries, affiliated companies, owners, co-owners, joint venturers associated therewith, and any of their agents, officers, and employees, hereinafter collectively referred to as 'COMPANY'..." (emphasis added). At trial, McMoRan introduced the original operating agreement for the West Delta 107 lease and a farmout of that lease which establish that McMoRan is a co-owner and joint venturer with Pennzoil in the West Delta 107 lease. Since McMoRan was a co-owner or joint venturer with Pennzoil, the obligations undertaken by Faustug in the towing agreement extended to McMoRan as a co-owner and joint venturer with Pennzoil.

In Paragraph X of the towing agreement Faustug agreed to provide hull, Protection and Indemnity ( P & I), excess P & I, towers' liability, and pollution insurance in varying amounts. The agreement further provided:

> Any language in the policies...which limits the coverage afforded to an assured who is not a shipowner or who is not entitled to the rights of limitation to which a shipowner is entitled shall be deleted. All of the aforesaid policies shall name COMPANY, its affiliates and subsidiaries as Additional Assureds, and shall provide that all said insurers waive subrogation against COMPANY, its affiliates and subsidiaries.

Paragraph XI of the agreement then goes on to provide:

> In the event (1) CONTRACTOR shall fail to secure the insurance coverages set forth in the preceding paragraphs, with or

without the knowledge of COMPANY, or (2) any claims, demands, suits or causes of action, of whatever kind or nature, are brought against COMPANY which arise out of or are connected with, directly or indirectly, the performance of towage services by CONTRACTOR as provided herein, which for any reason are not covered by the insurance protection afforded COMPANY pursuant to the provisions of the preceding paragraph, then CONTRACTOR shall itself be an insurer to the extent it has failed to comply with the obligations to provide insurance hereunder, and further agrees to defend, protect, indemnify and hold COMPANY harmless with respect to all such claims, demands, suits and causes of action even though they arise or result directly or indirectly from the sole or concurrent negligence of COMPANY, whether active or passive, primary or secondary.

CONTRACTOR further agrees at its sole cost and expense to procure and continuously maintain in full force and effect throughout the term of this agreement, with reliable insurance companies, and with limits of liability as specified herein, Contractual Liability Insurance covering

CONTRACTOR'S undertakings in this agreement and particularly the undertakings set forth in this paragraph.

McMoRan's interpretation of the blanket towing agreement between Pennzoil and Faustug which governed the move from Block 316 Eugene Island Area to Block 107 West Delta Area is that Faustug agreed to do the following:

1) provide P & I and tower's liability insurance;
2) name Pennzoil and its co-owners and joint venturers (McMoRan) as additional assureds on those policies and have the insurers waive subrogation against Pennzoil and its co-owners and joint venturers;
3) have deleted from this coverage any language that would limit coverage to an assured who is not a shipowner (the "as owner" limitation would be deleted from the policy);
4) to the extent Faustug failed to obtain the coverage required in Paragraph X, Faustug itself became the insurer of Pennzoil and its

co-owners and joint venturers for any claims arising directly or indirectly out of the performance of towage services; and

5) to the extent claims arose directly or indirectly out of the performance of the towage services, which were not covered by the required insurance, Faustug agreed to indemnify Pennzoil and its co-owners and joint venturers from those claims.

The "as owner" limitation gained notoriety from the decision in Lanasse v. Travelers Insurance Co., 450 F.2d 580 (5th Cir. 1971) and its progeny. In Lanasse, the court held that additional assureds who were charterers of a vessel were not afforded coverage under the vessel's P & I policy because the policy covered only liabilities "as owner" of the vessel.

McMoRan, relying on Helaire v. Mobil Oil Co., 709 F.2d 1031, 1042 (5th Cir. 1983) argues that the deletion of the "as

owner" clause in the P & I policy that Faustug was required to obtain as per the terms of the blanket towing agreement, creates coverage in favor of McMoRan for the liabilities of McMoRan alleged by various parties to this suit to have caused the rupture to TETCO's 20-inch natural gas pipeline.

In essence, McMoRan argues that deletion of the "as owner" clause in the P & I policy would change the P & I policy to a general liability policy with McMoRan listed as an assured. To take it one step further, McMoRan is in essence arguing that the terms of the blanket towing agreement required Faustug to secure a P & I policy that because of the "as owner" deletion would function as a general liability

policy inasmuch as said policy would afford coverage to McMoRan for its own acts of negligence. This type of policy, although labeled "P & I" policy should clearly be classified as an extraordinary policy of insurance. As counsel for Continental points out, this broad interpretation of the blanket towing agreement would turn the P & I policy into a comprehensive general liability policy and Continental (or Faustug as the case might be) would become one of the most comprehensive general liability insurers around. It is the law of the Fifth Circuit that this extraordinary type of agreement will not be upheld unless the parties specifically, clearly, and expressly agree to such an agreement. Branch v. Fidelity and Casualty

Co. of New York, 783 F.2d 1289 (5th Cir. 1986); Knapp v. Chevron U.S.A., Inc., 781 F.2d 1123 (5th Cir. - 1986); Rodriguez v. Olin Corp., 780 F.2d 491 (5th Cir. 1986); Lanasse, supra.

I reject the construction that McMoRan gives to Paragraph X and XI of the blanket towing agreement because the parties have not specifically, clearly, and expressly agreed that Faustug would procure P & I insurance that would function as a comprehensive general liability policy in favor of McMoRan protecting McMoRan from its own acts of negligence. Additionally, the provision in Paragraph X of the blanket towing agreement is ambiguous and therefore is to be construed against the drafter (Pennzoil hence McMoRan). I further and

finally note that hold harmless, indemnity and other forms of exculpatory agreements are to be strictly construed. Marathon Pipeline Co. v. M/V SEA LEVEL II, 806 F.2d 585 (5th Cir. 1986); Branch, supra; Knapp, supra; Rodriguez, supra; Lanasse, supra.

Accordingly, the claim of McMoRan against Faustug and continental for indemnity lacks merit for the reasons set forth above.

**MCMORAN'S CLAIM AGAINST CHANCE FOR INDEMNIFICATION**

McMoRan has filed a claim for contractual indemnity as a third party beneficiary of the Pennzoil Master Service Agreement with Chance. McMoRan points to language in a Master Service Agreement between Pennzoil and Chance which states, inter alia, that Chance is to indemnify

Pennzoil and its co-owners and joint venturers for various liabilities including liabilities caused by the negligence of Pennzoil and its co-owners and joint venturers. McMoRan argues that because it is a co-owner or joint venturer with Pennzoil it is entitled to the same form of indemnification as is Pennzoil as per the Master Service Agreement.

McMoRan fails to acknowledge that on December 7, 1982 McMoRan hired Chance to perform the services of a survey outfit in assisting the moving of the D/B OCEAN TRAVELER from Block 316 Eugene Island Area to Block 107 West Delta Area. This agreement was separate from and unrelated to the Master Service Agreement in existence between Pennzoil and Chance. In

contracting with Chance to perform these services, McMoRan did not enter into a Master Service Agreement containing an indemnity provision with Chance. Nor did there exist a Master Service Agreement with an indemnity provision between McMoRan and Chance prior to the date McMoRan contracted with Chance for the survey services. Since no such indemnity agreement existed, I find that McMoRan's claim against Chance for indemnity lacks merit. Additionally, for the same reasons as stated above, McMoRan's claims against the insurers of Chance, Fidelity and Casualty Company of New York, National Surety Corporation, Insurance Company of North America, Citadel Insurance Company, Underwriters at Lloyds and Insurance Companies in London and United

States Fire Insurance Company likewise lack merit.

**ODECO'S CLAIMS AGAINST CHANCE FOR INDEMNIFICATION**

ODECO has filed a claim against Chance for contractual indemnity based on an indemnity provision found in a Master Service contract between ODECO and Chance. The pertinent provisions of the contract state:

> (1)(A) This Agreement shall control and govern all activities of contractor ("John E. Chance") in connection with the performance of all work by contractor for company ("ODECO") under work orders, oral or written, given on or after the date hereof by company to contractor. (parentheticals added).
>
> (B) With respect to any work performed by contractor pursuant to contracts or work orders with parties other than company on any drilling barges, vessels, platforms, installations or other

> property of any kind owned by, leased to, chartered to, or under the control of company, Sections 8, 9, 10 and 11 of this contract shall be applicable as between contractor and company with respect to the work so performed.

The contract by its own terms applies to situations when the Contractor (Chance) works for the Company (ODECO) or when Chance works for a company other than ODECO but said work requires that Chance work on the property (including drilling barges, vessels, or platforms, installations, or other property of any kind) of ODECO.

At the time of the rupture of TETCO's 20-inch pipeline, Chance was hired by and was working for McMoRan. Additionally, at the time of the rupture, Chance was not involved in working on or aboard the property of ODECO. Therefore, since the

obligation to indemnify is to be strictly construed, Marathon Pipeline, supra, I find that the indemnity agreement in the Master Service Agreement between Chance and ODECO does not apply to this situation by its own terms. Accordingly, ODECO's claim against Chance for contractual indemnity is without merit. For the same reasons, ODECO's claim against the insurers of Chance, Fidelity and Casualty Company of New York, National Surety Corporation, Insurance Company of North America, Citadel Insurance Company, Underwriters at Lloyds and Insurance Companies in London and United States Fire Insurance Company lacks merit. The aforesaid insurers' counter-claim against ODECO for attorney's fees is likewise without merit.

**LIMITATION OF LIABILITY**

Faustug and Tractug have filed in three separate civil actions for limitation of or exoneration from liability pursuant to 46 U.S.C. §183(a) which reads in part:

> The liability of the owner of any vessel, whether American or foreign, ... for any loss, damage or injury by collision, or for any act, matter, or thing, loss, damage, or forfeiture, done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not, except in the cases provided for in subsection (b) of this section, exceed the amount or value of the interest of such owner in such vessel, and her freight then pending. (Emphasis added).

The burden of proof with respect to limitation actions was detailed in In re Ferry GEORGE PRINCE, 455 F. Supp 272, 281 (E.D. La. 1978):

> The determination of whether a shipowner is entitled to limit his liability is a two step process. First, the Court must determine what acts of negligence or conditions of unseaworthiness caused the accident. Second, the Court must determine whether the shipowner had knowledge or privity of those same acts of negligence or conditions of unseaworthiness. FOr it is only knowledge of those factors which are found to have actually caused the accident, and not just any negligent acts or unseaworthy conditions, which preclude a shipowner's ability to limit. Farrell Lines, Inc. v. Jones, 530 F.2d 7 (5th Cir. 1976). In determining this issue, the shipowner has the burden of proof in establishing a lack of privity or knowledge, while the initial burden of proving negligence or unseaworthiness rests on the claimants. Tihle v. Aldacosta, 544 F.2d 752 (5th Cir. 1977).

A review of the evidence in the present case shows Faustug and Tractug have failed to meet the burden of proving the lack of privity and knowledge of the owner of the

three tugs. It was determined at trial that the tugs were inadequately equipped when they broke ground prior to the accident subject of this lawsuit. The Loran equipment was inadequate, or not functioning properly, and the satellite navigation system was not reliable. The crew was incompetent. This shows a lack of due diligence by the owner of the tugs to make the vessels seaworthy prior to sailing. Accordingly the request by Faustug and Tractug for limitation of or exoneration from liability is without merit.

NO. 89-460

FILED
SEP 17 1989
JOSEPH F. SPANIOL, JR.
CLERK

# In the
# Supreme Court of the United States
**OCTOBER TERM 1989**

**MARATHON OIL COMPANY, ET AL**

**Petitioners**

**VERSUS**

**McMoRAN OFFSHORE EXPLORATION CO., et al**

**Respondents**

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**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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**VOLUME II**
**APPENDIX TO**
**PETITION FOR WRIT OF CERTIORARI**

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# APPENDIX C

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

TEXAS EASTERN TRANSMISSION CORPORATION

V.

MCMORAN OFFSHORE EXPLORATION COMPANY, FAUSTUG MARINE CORPORATION, JOHN E. CHANCE AND ASSOCIATES, INC., OCEAN DRILLING AND EXPLORATION COMPANY TUGS ZP CHALONE, ZP CONDON, ZP CAYMUS AND THE DRILLING RIG OCEAN TRAVELER

CIVIL ACTION NO. 83-1584
and consolidated cases

SECTION "E/2"

November 12, 1987

UNOPPOSED MOTION TO AMEND
FINDINGS AND CONCLUSIONS

NOW COME, through undersigned counsel, Faustug Marine Corporation and Tractug Associates, in their behalf and for all other interested parties herein, an upon suggesting to the Court that Findings and Conclusions were issued by this Court September 16, 1987; that on page 12 of the Court's Findings and Conclusions, the Court found with reference to the claims of Marathon Oil Company, et al, that, "Damage to the 12-inch pipeline was sustained when an anchor of the D/B OCEAN TRAVELER was dragged over the pipeline"; that all interested parties agree, as shown by their consent hereto, that there was no evidence introduced at trial to support this finding

and, to the contrary, that Marathon Oil Company, et al, made no claim for physical damage to the 12-inch pipeline; that this finding may be relevant to issues which will be considered on appeal; and that all other interested parties, including Marathon Oil Company, et al, have stated they do not oppose this motion by Faustug Marine Corporation and Tractug Associates to amend the Court's findings and conclusions to omit the said last sentence on page 12 thereof, referring to damage to the 12-inch pipeline; and

MOVE THE COURT to amend the Findings and Conclusions issued September 16, 1987 to delete the last sentence on page 12 thereof on the ground there was no evidence at trial that the 12-inch pipeline of

Marathon Oil Company, et al, sustained physical damage.

ORDER

CONSIDERING THE FOREGOING, it is and the same is hereby ordered that the Findings and Conclusions of the Court issued September 16, 1987 be and the same are hereby amended and modified to omit and delete the last sentence appearing on page 12: "Damage to the 12-inch pipeline was sustained when an anchor of the D/B OCEAN TRAVELER was dragged over the pipeline", on the grounds there was no evidence at trial of physical damage to the 12-inch pipeline of Marathon Oil Company, et al, and otherwise to remain in full force and effect.

**APPENDIX D**

TEXAS EASTERN TRANSMISSION CORPORATION, Plaintiff,

V.

McMoRAN OFFSHORE EXPLORATION CO., et al, Defendants.

In the Matter of the Complaint of TRACTUG ASSOCIATES and Faustug Marine Corporation for Exoneration From or Limitation of Liability as Owners of ZP Chalone, ZP Caymus and ZP Condon, and Odeco, Inc., Plaintiffs-Appellees.

V.

MARATHON OIL CO., et al, Defendants-Appellants

MARATHON OIL CO., et al, Plaintiffs-Appellants,

V.

MCMORAN OFFSHORE EXPLORATION CO., Defendant,

Faustug Marine Corp., et al,. Defendants-Appellees.

TEXAS EASTERN TRANSMISSION CORPORATION, Plaintiff-Appellee,

V.

MCMORAN OFFSHORE EXPLORATION CO., Defendants,

and

FAUSTUG MARINE CORP., Ocean Drilling & Exploration Co., Continental Insurance Company and Tractug Associates, Defendants,

V.

JOHN E. CHANCE & ASSOCIATES, INC., Defendant-Appellant.

In the Matter of the Complaint of TRACTUG ASSOCIATES and Faustug Marine Corporation for Exoneration From or Limitation of Liability as Owners of the ZP Chalone, ZP Caymus and ZP Condon, and Odeco, Inc., Plaintiffs-Appellees,

V.

MARATHON OIL CO. and MCMORAN OFFSHORE EXPLORATION CO., Defendants-Appellants,

MARATHON OIL CO., et al.,
Plaintiffs-Appellants,

V.

MCMORAN OFFSHORE EXPLORATION
CO., et al., Defendants-Appellee.

CONTINENTAL INSURANCE COMPANY,
Defendant-Appellant,

V.

MCMORAN OFFSHORE EXPLORATION
CO., et al., Defendants-Appellees.

Nos. 87-3509, 87-3879.

United States Court of Appeals,
Fifth Circuit.

January 3, 1989.

863 F.2d 355 (5th Cir. 1989)

Appeals from the United States District Court for the Eastern District of Louisiana.

Before RUBIN, GARZA, and KING, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

An underwater pipeline was damaged during the relocation of a drilling rig in the Gulf of Mexico, resulting in a multitude of disputes, including: the apportionment of fault among the parties that participated in the relocation; what party or parties were due compensation for the property damaged; and the extent to which several parties purportedly indemnified one another. We affirm the judgment of the district court in all but

the last of these determinations, which we reverse only in part.

I.

A winter storm disrupted the process of relocating the drilling rig at a specific location in the waters of the Gulf of Mexico on the night of December 31, 1982. The record discloses the events surrounding this disruption and subsequent accident. The Pennzoil Exploration Production Company had leased to McMoRan Offshore Exploration Company Block 107 West Delta Area off the coast of southeast Louisiana, retaining a 34% ownership interest in the proceeds derived from the production of gas from the lease. To help McMoRan drill and draw gas from wells in Block 107, Pennzoil assigned to McMoRan the D/B OCEAN TRAVELER, a

semisubmersible drilling rig leased by Pennzoil but owned and operated by ODECO.

The D/B OCEAN TRAVELER was situated in Block 316 Eugene Island Area. Since the rig possessed no locomotive capabilities, navigational tools, or weather instruments, Pennzoil and McMoRan retained several specialized vessels to perform these functions and move the drilling rig onto Block 107: Pennzoil procured the services of three tug boats owned by Tractug Associates and operated by Faustug Marine Corporation (the ZP Caymus, ZP Chalone, and ZP Condon), and McMoRan hired a survey boat owned by John E. Chance & Associates, Inc. (the M/V Atlantic Surveyor) and an anchor boat owned by Arthur Levy (the M/V Mustang Island). The tug boats were

responsible for towing the drilling rig onto location; the survey boat was to stabilize the rig over the drill site and deploy various buoys at and near the well site to indicate to the rig the well area and anchor pattern; and the anchor boat was to raise and rack the anchors at Block 316 and set them at Block 107. ODECO employees-engineer Terrebone, toolpusher Trahan, and superintendent Stogner-were aboard the D/B OCEAN TRAVELER throughout the relocation process. In addition to relying on these specialized vessels and ODECO personnel aboard the rig, McMoRan stationed its company representative, Bobby Craft, on board the D/B OCEAN TRAVELER. Craft had the ultimate authority to suspend or terminate any activities of the rig or

associated vessels conducted in an unsafe manner.

On the morning of December 28, 1982, the rig's anchors were lifted out of the seabed in Block 316, and early on the morning of the 29th, the rig began its trip to Block 107. On December 30, Chance's survey boat departed Fourchon, Louisiana for the proposed location in Block 107. By 11 p.m., the crew had dropped off three instrument men at three fixed platforms surrounding the location to fix the points at which various location and anchor marker buoys were to be set.

At 5 p.m. on December 31, the rig began its usual procedures for moving onto location: the tug boats paused approximately three miles from the proposed

location in Block 107 to shorten their tow lines from 1700 feet to approximately 850 feet, and Terrebone requested Chance's survey vessel and Levy's anchor boat to stand by the markers for the Nos. 6 and 7 anchors respectively. Once the survey boat had properly placed these markers, the rig could be towed between these two gate buoys until the bow of the rig reached the referenced buoy in the middle of the area. It is customary practice to drop the Nos. 6 and 7 anchors, the rig's two stern anchors, as the rig passes through the gate buoys in order to slow the rig's progress and bring it to its final location. The rig is then held on location by the tugs until the anchor boat sets out the remaining six anchors in a designated pattern and resets

the Nos. 6 and 7 anchors in their appropriate positions.

The D/B OCEAN TRAVELER entered the gate buoys on December 31, and dropped its Nos. 6 and 7 anchors at 9 p.m., releasing approximately 1750 feet of chain to the No. 6 anchor off the starboard stern and 1100 feet of chain to the No. 7 anchor off the port stern. After releasing these anchors, however, the anchor boat informed the rig that it could not continue operations because severe weather obscured the location flags that had been set out by Chance and prevented it from placing the rig's anchors in their specified locations.

After the anchor handling operation had been discontinued, Terrebone, ODECO's engineer aboard the rig, asked the tug

boats if they could hold the rig steady facing 90 degrees due east into the wind. Faustug responded affirmatively. Throughout the night of December 31, Terrebone repeated this question to the tugs, offering to drop the Nos. 2 and 3 anchors to help hold the rig in position. Faustug declined, assuring Terrebone each time that it could maintain the rig's position facing 90 degrees due east into the wind. Moreover, every two hours during the night, the control room operator aboard the rig contacted the lead tug to monitor the position of the rig, and was continually informed that the rig was being held in position.

At 9:30 p.m. on December 31, Terrebone asked the Chance survey boat for a

"position shct" to determine the location of the rig, but the survey boat responded that its auto-tape instrument was inoperable, and that the survey boat could not, therefore, inform the rig of its precise location. Three and a half hours later, the survey boat received an operable set of auto-tapes, but neither informed Terrebonne of their arrival nor used them to determine the position of the rig.

At 1:40 on the morning of January 1, the tow line of the Z/P Caymus parted at the bulwark of the rig, where the chafing gear is normally placed to prevent such an occurrence. Terrebone then asked the tugs whether the rig could still be held on location without dropping its bow anchors. Faustug stated again that it needed no aid

from the rig to hold it on location. At 4:30 a.m., the Z/P Caymus gave its mooring line to the anchor boat so the anchor boat could assist in holding the rig in place.

At 5:00 a.m., Terrebone recorded in the rig's log book that the rig was "[h]olding ...90 degrees into the wind and sea. Survey boat said in area of loc[ation]." A half hour later, craft, McMoRan's representative, told and ODECO employee to ask the survey boat to determine the location of the rig. Sometime between 5:30 and 7:45 a.m. on January 1, the chance survey boat informed Terrebone that the rig was three to four miles west of location. Both ODECO personnel and Craft found it hard to believe that the rig had moved during the night, and suspected that Chance

has placed it in the wrong block the previous night.

At 7:45 on the morning of January 1, aware that the rig was not on location, ODECO personnel began to retrieve the No. 7 anchor, completing this operation within four hours. Around noon, Terrebone asked the anchor boat to "chase out" the No. 6 anchor because its buoy had disappeared, abut the anchor boat refused; the anchor had sunk into the Gulf and the anchor boat might be damaged if it ran over the buoy. Consequently, with the aid of the tug and anchor boats, the rig "walked back" toward the No. 6 anchor until it was right over the anchor. The rig then used its windlass to attempt to raise the No. 6 anchor, but it could not raise the anchor from the

ocean floor. Even when exerting its maximum power of 600 amps, the windlass would overheat and shut down automatically without unseating the anchor.

Between 3:00 and 4:00 p.m. on January 1, Craft halted the retrieval of anchor No. 6 to determine if any pipelines were in the area. At Craft's request, Terrebone radioed the survey boat and asked it to determine the rig's position. When Chance replied that it could not make such a determination because of poor visibility, one of the tugs interrupted the radio transmission and informed the rig that it was located in the southwest corner of Block 106 West Delta Area. A quarter of an hour later, Craft called Chance again to ask if Chance knew of any pipelines in the

area. Chace's party chief, Glenn Miller, asserted that he had no knowledge of any lines, but within the next hour, informed the rig that a pipeline was located 500 feet west of the Block 105/106 border.

Thinking that the rig was in the southwest corner of Block 106, and knowing both that a pipeline ran 500 feet west of the Block 105/106 border and that the No. 6 anchor had approximately 600 feet of chain out, Craft met with ODECO personnel-Terrebone, Trahan, and Stogner--to discuss the possibility that the anchor was hooked on a pipeline. ODECO personnel informed Craft that they had previously experienced similar difficulties retrieving anchors in this area because the Gulf bottom is composed of silt and "gumbo", permitting

deep anchor penetration. After discussion, the group agreed to recommence retrieval of the anchor.

At approximately 5:30 p.m. on January 1, after retrieval efforts had resumed, a large black mushroom cloud erupted from the water approximately 1000 to 2000 feet off the starboard stern of the rig; the No. 6 anchor had ruptured a 20-inch natural gas pipeline owned by the Texas Eastern Transmission Corporation (TETCO). Subsequent sonar scans revealed that this 20-inch pipeline had been displaced only 50 feet, indicating that the No. 6 anchor may not have been hooked on it during the entirety of the retrieval process.

At 6:00 p.m., the No. 6 anchor was cut with approximately 400-500 feet of line

still out. The tug boats then began to tow the rig east to its proper location in Block 107, and the survey boat gave the final "shot" or "tie-in" at approximately 1:00 a.m. on January 5, 1983.

II.

The 20-inch pipeline ruptured by the rig's No. 6 anchor extends from Block 89 South Pass across the seabed of the Gulf of Mexico through Block 105 West Delta Area to Venice Station in southeast Louisiana. It was built by TETCO in 1981 as a result of Marathon Oil Company's exploration and discover of gas in South Pass 89. In its application to the Federal Energy Regulatory Commission for approval to build the pipeline, TETCO stated that its proposed pipeline would not only provide

access to Marathon's "committed reserves in South Pass Block 89", but also to "areas adjacent to the proposed pipeline route as they become available." To fulfill this goal, TETCO constructed several "tie-in" points along the pipeline so it could transport gas produced by other companies.

At platform A in South Pass 89, Marathon processes, separates, and delivers natural gas and liquid hydrocarbons through a six-inch pipeline to platform 89B. At platform 89B, the gas and liquid hydrocarbons are separated, and the gas is processed, cleaned, scrubbed, compressed, cooled, and delivered into the 20-inch TETCO pipeline. High pressure gas recovered from the well heads in South Pass 89B is reduced in pressure, separated,

processed, cleaned, and delivered directly into TETCO's 20-inch pipeline. Low pressure gas from South Pass 89B is also compressed and cooled, and then entered into the 20-inch pipeline.

Marathon leases to TETCO portions of platform 89B on which TETCO has placed meter skids to measure the amount of gas that passes into the 20-inch pipeline. As the gas passes through the meter, ownership of the gas vests in TETCO according to the gas-purchase agreement between Marathon and TETCO. Although TETCO built and owns the meter skids, Marathon maintains them under a separate maintenance contract in addition to maintaining the pilot valves on the meters that measure gas pressure. These pilot valves are attached to TETCO's 20-

inch pipeline on both platforms A and B, and are part of Marathon's emergency shutdown system.

The gas is transported 47 miles in the 20-inch pipeline from platform 89B to shore. On shore, TETCO uses a slug catcher to collect the liquid hydrocarbons, water condensate, and hydrates. This slug catcher connects to flow lines, owned and operated by Marathon, which sequester the liquids into an oil tank for allocation to Marathon. From the slug catcher, the gas flows through two dehydrators, owned and operated by Marathon, and onto distillation facilities at the Warren gas plant where liquefiable hydrocarbons, belonging to Marathon, are removed from the gas. The gas is then metered, analyzed, and returned

into TETCO's 20-inch pipeline at the rear of the Warren plant. Marathon paid for 880 feet of the 20-inch pipeline at the integrated delivery system at the Warren plant, although neither Marathon nor TETCO can identify precisely for which section Marathon paid. The gas is subsequently delivered to TETCO's 36-inch transmission line, and transported 50 miles to TETCO's compression station at LaRose, Louisiana.

The No. 6 anchor of the D/B OCEAN TRAVELER ruptured the 20-inch pipeline between Marathon's platform at South Pass 89B and TETCO's slug catcher on shore. Thirty million cubic feet of natural gas, together with its liquids and liquefiable hydrocarbons, erupted from the delivery system at the time of the break.

Marathon's pilot valves immediately detected a loss of pressure, communicated this information to various control panels, closed off the wells, and terminated production aboard platforms 89A and B. Marathon later resumed production at South Pass 89A and B through its own modified 12-inch pipeline.

III.

The rupture of the 20-inch pipeline sparked an explosion of litigation: TETCO sued McMoRan, Faustug, Faustug's insurer (Continental Insurance COmpany), ODECO, Chance, and Arthur Levy for damages to its 20-inch pipeline; Marathon sued McMoRan, Faustug, and ODECO for loss of production resulting from the rupture of TETCO's 20-inch pipeline; McMoRan claims Faustug, or

Faustug's insurer, Continental, indemnified it; and ODECO claims McMoRan indemnified it, and that it is entitled to costs and attorney's fees. Prior to trial, TETCO settled its claim against ODECO, Faustug, and Continental for $9.5 million, assigning to these companies its remaining rights against McMoRan, Chance, and Arthur Levy.

After hearing argument, the district court (1) apportioned fault between the various parties; (2) denied Marathon's claim for loss of production; (3) denied McMoRan's claim that Faustug or Continental indemnified it; and (4) denied ODECO's claim that McMoRan indemnified it and ODECO's request for costs and attorney's fees.

IV.

**A. Apportionment of Fault**

The district court held Faustug, ODECO, McMoRan, and Chance at fault for rupturing TETCO's 20-inch pipeline because each was "in a position to prevent the accident had one of them exercised requisite reasonable care."

Faustug was negligent, the district court found, because it continually and erroneously reassured Terrebone and the control room operator that the tug boats needed no assistance to hold the rig on a 90 degree heading in the area of location. The court also premised Faustug's negligence upon its finding that the tugs were unseaworthy; they did not have a properly functioning LORAN-C unit, which

could have plotted the location of the rig throughout the night of December 31, and one tug's chafing gear was not in the proper location on the towline that parted.

ODECO personnel were negligent, the district court found, by advising Craft, before they had determined whether anchor No. 6 was hooked on a pipeline or other underwater obstruction, that difficulty in retrieval was common in the West Delta area. ODECO personnel advised Craft to continue retrieval despite their knowledge that the rig was in the southwest corner of Block 106, a pipeline existed 500 feet inside the Block 105/106 border, and the No. 6 anchor had approximately 600 feet of chain out.

McMoRan acted negligently, the district court found, when Bobby Craft, McMoRan's representative aboard the D/B OCEAN TRAVELER, recommended the retrieval of anchor No. 6 after he had first shut it down, knowing, like ODECO personnel, the location of the rig, the existence of a nearby pipeline, and the amount of anchor line still out.

Chance was negligent, the district court found, because once the rig was moved onto location, chance had a duty to ensure that the rig was positioned on location over the intended drilling site. The court held that Chance breached this duty because its personnel on the drilling platforms and survey boat remained silent when they observed the westward movement of the rig

out of sight during the night of December 31. Had Chance spoken up when it first saw the rig drifting, the rig could have dropped its bow anchors to prevent further movement.

After finding these parties negligent, the district court assigned a percentage of fault to each:

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|---|---|
| Faustug | 70% |
| ODECO | 10% |
| McMoRan | 10% |
| Chance | 10% |
| Levy | 0% |

McMoRan, Chance and Faustug each challenge the district court's apportionment of fault, contending that others were more reprehensible.

[1] As a preliminary matter, we find that the district court used the correct method-a system of "proportional fault"-for allocating responsibility. When the negligent conduct of each party "contribute[s] to the loss, complete apportionment between the negligent parties, based on their respective degrees of fault, is the proper method for calculating and awarding damages in maritime cases."[7]

1. MCMORAN

[2] McMoRan challenges the district court's assignment to it of 10% liability, contending that craft, its company man

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[7] Hercules, Inc. v. Stevens Shipping Co., 765 F.2d 1069, 1075 (11th Cir. 1985).

aboard the D/B OCEAN TRAVELER, acted reasonably by intervening to stop retrieval of anchor No. 6 when it appeared dangerous, and then asking ODECO personnel and Chance for relevant information. In particular, McMoRan asserts that this court's decision in Wallace v. Oceaneering International[8] supports its freedom from fault; Craft had primary responsibility only over drilling operations, and had no operational control over ODECO, who was responsible for moving the rig onto location.

Craft undoubtedly exercised good judgment when he suspended anchor-retrieval operations between 3:00 and 4:00 p.m. on January 1, and sought additional

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8 727 F.2d 427 (5th Cir. 1984).

information from Chance and conferred with ODECO personnel. Faustug informed Craft that the rig was somewhere in the southwest corner of Block 106, Chance revealed that a pipeline ran 500 feet over the Block 105/106 boundary, and Craft knew already that the rig and 600 feet of anchor line still out.

With this information, Craft ordered retrieval of the No. 6 anchor to continue. This information provided an insufficient basis, however, upon which to resume retrieval; it gave Craft a margin of error of only 100 feet. Missing a critical piece of information-the precise location of the rig in the southwest corner of Block 106, Craft should have been aware that there was a very real possibility that the No. 6

anchor was hooked on a pipeline in Block 105. Prudence dictated that Craft stay the retrieval of the anchor until he had discovered the precise location of the rig in the southwest corner of Block 106. Slattery, McMoRan's on-shore drilling engineer, underscored Craft's negligence when he testified that he takes precautionary measures whenever pipelines are within 1,000 feet of a rig's location.

McMoRan's second argument, that Craft did not have operational control over the retrieval process and cannot, therefore, be held liable as a matter of law, seeks to equate the role of Craft to that of the company man in Wallace v. Oceaneering International. In Wallace, we held that an offshore well owner, represented by his

company man aboard a semisubmersible drilling rig, was not liable for injuries caused by a negligent independent drilling and diving contractor, despite the fact that the "company man" aboard the rig "monitored the progress of the work" and could halt the diving and drilling "if he observed an obviously dangerous situation."[9]

While Wallace enunciated the relationship between a company man and the independent contractor he monitors, the court found two facts dispositive of the company's liability: (1) the company man "had no actual control over or responsibility for the details of the

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[9] Wallace, 727 F.2d at 436-37.

drilling and diving work, but merely inspected the progress," and (2) "there was no evidence that [t]he [company man] had been aware" of the actual circumstances of the accident.[10]

McMoRan's Offshore Drilling Contract assigns ODECO responsibility for moving the rig onto location, and provides in Article III that the "Operator [McMoRan] shall have no direction or control of Contractor [ODECO], .. Operator being interested only in the results to be obtained." The contract, as the district court assumed, gave Craft, as a company man, "no operational control" over the independent contractor. Despite this contractual

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[10] Wallace, 727 F.2d at 437.

limitation, however, Craft intervened in the operation and halted retrieval of the No. 6 anchor. After that intervention, Craft had the ultimate authority over the moving process; Terrebone awaited his orders and only he could direct the crew to recommence retrieval of the No. 6 anchor. Craft's subsequent decision to resume retrieval was taken, therefore, while he had actual operational control over the work of the independent contractor.

Moreover, McMoRan has failed to demonstrate that Craft was ignorant of the circumstances that led up to the accident. Unlike the company man in Wallace who possessed no knowledge of surrounding circumstances and took no actions, Craft had as much information as anyone

concerning the positions of the rig, anchor line, and pipelines; his initial intervention and solicitation of information indicates his awareness. Once Craft had halted retrieval for safety reasons, his premature order to resume retrieval absent the necessary information establishes his negligence.

2. CHANCE

[3] Chance does not contest the district court's finding that Chance personnel witnessed the rig drifting during the storm; instead, it challenges the district court's assessment of 10% liability on the ground that it had no legal duty to inform the rig that it was drifting. As surveyor, Chance contends that it responsibility was limited to

standing on location and acting as a reference point; it was not obliged to inform the rig that it had drifted three and a half miles off location. Alternatively, Chance argues that even if it had such a duty, its failure to warn was not the proximate cause of the accident.

Chance performed survey work for McMoRan by oral agreement. Without a written contract delineating Chance's obligations, we cannot determine the precise scope of Chance's surveying responsibilities.[11] Looking to the customary practice of the maritime industry or the expectations of participants does not help Chance's argument, given that

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[11] See Marathon v. Sea Level II, 806 F.2d 585, 590 (5th Cir. 1986).

Craft asked Chance twice to determine the location of the rig (once at 9:30 p.m. on December 31, and again between 3:00 and 4:00 p.m. on January 1), and once late in the afternoon on January 1, to determine if any pipelines lay near the rig. These repeated queries suggest that "those aboard the rig ... expect[ed] the surveyor to [help] 'direct' the rig onto location."[12]

Even were we, in reliance on custom or expectations, to restrict Chance's obligations to within one mile of location, Chance would be exonerated from liability only for the information its party chief

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12 Marathon Pipeline Co. v. Drilling Rig Rowan/Odessa, 527 F.Supp. 824, 834 (E.D.La. 1981), aff'd 699 F.2d 240 (5th Cir. 1983), cert denied, 464 U.S. 820, 104 S.Ct. 82, 78 L.Ed. 2d 92.

provided Terrebone late in the afternoon on January 1 when asked if any pipelines were buried beneath the waters around the rig. The geographical limitation does not excuse Chance personnel, however, from informing the rig that it had drifted off location after it had been placed on location and had dropped several anchors. Chance knew that the rig was in the process of moving onto location on December 31 and had dropped its Nos. 6 and 7 anchors. Once these anchors were dropped, Chance had a duty to apprise the rig of its knowledge that the rig was drifting off location during the inclement weather. If Chance had conveyed this information to the rig when it first saw the rig drifting on the night of the storm, rather than waiting

until 5:30 a.m. on January 1, the rig could have dropped additional anchors, and prevented further movement. Timely warnings might have prevented the sequence of events that resulted in damage to TETCO's 20-inch pipeline. The contribution of intervening causes does not, of course, eliminate Chance's proportional fault.[13]

3. FAUSTUG

[4] Faustug contends that the district court should not have found it seven times more liable than Chance since Faustug and Chance committed the same error-failing to warn the rig that it was moving during the night of the storm. Faustug and Chance, Faustug argues, should bear the same

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[13] Hercules, 765 F.2d at 1075.

proportion of fault.

The district court did not, however, hold Faustug and Chance liable for the same negligent conduct. Chance's error lay in its silence until 5:30 a.m. on January 1; Faustug's negligence lay in its repeated, specific assurances that it was holding the rig in position, its failure to have a LORAN-C navigational unit on board its tug boats, and its improper use of its chafing gear.

Moreover, even if Faustug's negligent conduct were considered equivalent to Chance's actions, the liability imposed upon each party is calculated not only according to each party's conduct, but according to the job each had and the duty each owed. Whatever obligations Chance

incurred as surveyor, they were cumulatively less than the primary responsibility Faustug bore for guiding the rig safely to Block 107 and, more specifically, for assuring that the rig remain in place during the night of the storm. This disparity in task and duty makes Faustug's parity thesis untenable.

Aside from Faustug's contention that its fault was comparable to Chance's negligence, no party challenges the district court's implicit holding that Faustug was responsible, more than any other party, for assuring safe passage for the rig, and,in particular, for holding the rig in place overnight. We see no reason to alter the district court's allocation of 70% of the fault to Faustug, and 10% to

ODECO, McMoRan, and Chance, respectively. We review such a determination under the clearly erroneous standard,[14] giving deference to the district court's decision, since the allocation of proportionate fault is, at best, a judgment call not susceptible to precise measurement. The district court's distribution of fault accords with the degree to which each party was negligent and the extent to which this negligence caused the rupture of TETCO's 20-inch pipeline.

**B. MARATHON'S CLAIM FOR LOSS OF PRODUCTION**

[5] The district court dismissed Marathon's claim for loss of production

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[14] Gator Marine Serv., Etc. v. J. Ray McDermott & Co., 651 F.2d 1096, 1099 (5th Cir. 1981); Hercules, 765 F.2d at 1075 n. 11.

under Fed.R.Civ.P. 41(b), holding that Marathon had no "proprietary interest" in the damaged property, as required by Robins Dry Dock & Repair Co. v. Flint[15] and State of Louisiana ex rel. Guste v. M/V Testbank.[16]

Marathon appeals, claiming a proprietary interest in the 20-inch pipeline on the basis that (1) it exercised functional ownership over the 20-inch pipeline, (2) it had functional control and possession over the pipeline, and (3) its platforms and pipeline facilities and the 20-inch pipeline functioned as a permanent

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15 275 U.S. 303, 48 S.Ct. 134, 135, 72 L.Ed. 290 (1927).

16 752 F.2d 1019, 1022 (5th Cir.1985) (en banc), cert. denied, 477 U.S. 903, 106 S.Ct. 3271, 91 L.Ed.2d 562 (1986).

and complete integrated unit. Marathon makes no claim for the loss of gas or other derivative products in the pipeline at the time of the accident.

Marathon contracted with TETCO for use of TETCO's 20-inch pipeline, and no one doubts that the damage to the pipeline adversely affected Marathon's exercise of its contractual rights. In such circumstances, however, this circuit, guided by the Supreme Court, has been unwilling to permit the contracting party to sue the injuring party for tortious conduct without demonstrating a "proprietary interest" in the damaged property.[17] Justice Holmes provided

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[17] **Testbank**, 752 F.2d at 1022; **Robins**, 48 S.Ct. at 135. (While I continue to adhere to Judge

rationale in Robins :

> The injury ... was no wrong to the [contracting party] but only to those to whom [the damaged property] belonged.... [A] tort to the person or property of one man does not make the tort-feasor liable to the another merely because the injured person was under a contract with that other unknown to the doer of the wrong.... The law does not spread its protection so far.[18]

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Wisdom's dissent in **Testbank**, in which I joined, I recognize that the decision is the law of the circuit.) .

18 Robins, 48 S.Ct. at 135 (citations and portions of text omitted). See East River S.S. Corp. v. Transamerica Delaval, 476 U.S. 858, 106 S.Ct. 2295, 2302-04, 90 L.Ed.2d 865 (1986); Prosser & Keeton, **The Law of Torts** (5th Ed.1984) at 1001; Restatement (2d)

In Testbank, this circuit underscored the significance of Robins as "a pragmatic limitation imposed by the Court upon the tort doctrine of foreseeability," the requirement that a party show a "proprietary interest" forestalls the "wave upon wave" of litigation based upon the "successive economic consequences" of a "disaster inflicting large and reverberating injuries."[19] Thus Robins and Testbank preclude a party whose rights derive from a contractual, business arrangement from suing in tort a party with whom it has no such relationship if it cannot show the requisite level of interest

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of Torts § 766C (1973).

19 Testbank, 752 F.2d at 1023, 1028, 1029.

in the damaged property itself.

Marathon concedes that, except for an insignificant, unidentifiable stretch of pipe at the Warren plant, it does not actually own any of TETCO's 20-inch pipeline. Instead, Marathon attempts to circumvent Robins' ownership requirement by demonstrating that it has the requisite "proprietary interest" in the pipeline.

Marathon contends that this court's opinion in J. Ray McDermott & Co. v. S.S. Egero[20] provides support for the conclusion that it exercised functional control over the 20-inch pipeline. In that case, we held that the builder of a pipe "'owne[d]'" and could recover for a pipe damaged during construction.[21] Even if we

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20 453 F.2d 1202 (5th Cir.1972).

21 Id., 453 F.2d at 1204.

ignore the diminished importance of S.S. Egero in the context of the circuit's more recent and thorough examination of "proprietary interest" in Testbank, the facial applicability of S.S. Egero to Marathon's claim is tenuous: Marathon was not in the process of constructing a pipeline when the damage occurred; instead, the pipeline, which was actually owned by TETCO, was already constructed and operating. Since S.S. Egero stands only for the proposition that a builder under contract is the owner of what it is building until it receives payment and transfers actual title, it does not support Marathon's claim that the oil company was the functional owner of the 20-inch pipeline.

Marathon claims alternatively that it exercised "functional control and possession" over the 20-inch pipeline. To support this claim, Marathon adverts to this court's opinion in Louisville & Nashville R. Co. v. M/V Bayou Lacombe,[22] in which we held that the Louisville & Nashville Railroad did **not** have a proprietary interest in a damaged bridge which it used under contract from Southern Railway: Louisville & Nashville "never had possession or control of [the] property,...[t]he bridge [wa]s maintained entirely by Southern's employees[,and] Louisville & Nashville ha[d] no obligation to repair the bridge or contribute to the cost of repairs ..."[23]

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22 597 F.2d 469 (5th Cir.1979).

23 Id., 597 F.2d at 474.

Bayou Lacombe employed three criteria to evaluate proprietary interest: actual possession or control, responsibility for repair, and responsibility for maintenance. Marathon does not contend that it actually possessed or controlled the property: it did not possess the exclusive right to use the 20-inch pipeline, and it could not control how TETCO used it. Nor did Marathon have any responsibility to perform repairs on the 20-inch pipeline when it was damaged. Marathon is, therefore, compelled to rely upon its maintenance of a portion of TETCO's property to distinguish itself from the railroad in Bayou Lacombe.

Marathon did maintain various appurtenances to the 20-inch pipeline, including the meter skids, pilot valves,

pumps, processing equipment, compressors, vent lines, flare lines, control lines, dehydrators, and glycol boilers. Even were we to accept the proposition that repair of property endows one with a proprietary interest, the district court found that "Marathon made no contribution ... toward upkeep or maintenance of TETCO's 20-inch pipeline..." The only property besides its own that Marathon maintained were TETCO's meter skids, which are located on Marathon's property. We fail to see how this routine maintenance, consisting of the painting, cleaning, and inspecting of meter skids, endows Marathon with functional possession or control over the entire 20-inch pipeline. Indeed, contracts between Marathon and TETCO provided expressly that

TETCO "shall be fully responsible for the construction, operation, maintenance, repair and use of its equipment and property on the ...space" leased from Marathon. The maintenance of relatively minor parts of the pipeline is not equivalent to functional possession or control over the 20-inch pipeline.

Finally, Marathon claims that it possessed a "proprietary interest" in the pipeline because TETCO's 20-inch pipeline and Marathon's various appurtenances are permanently and completely integrated. Without Marathon's compressors, separators, coolers, flow lines, dehydrators, and pilot valves, Marathon claims, the 20-inch pipeline would not be functional. Marathon finds support for

this gloss of "proprietary interest" in Domar Ocean Transportation, Ltd. v. M/V Andrew Martin,[24] in which we held that a "tug and tow were so operated as an integrated unit that the physical damage to the barge was sufficient to allow [the owner of the barge to] recover[] for the loss of use of both under ... Testbank."

Marathon misreads Andrew Martin. While Andrew Martin allowed a plaintiff to recover for the loss of use of both the barge he owned and the tug for which he had contracted, we permitted this recovery only because the "physical damage to the **barge** was sufficient," and "[m]oreover," the barge-owner "had spent $350,000 to install a raised pilothouse aboard the [tug] and

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[24] 754 F.2d 616, 617 (5th Cir.1985)

[barge] to be used together...."[25] In contract, Marathon claims no injury to property that it actually owned. This fact alone distinguishes Marathon from the barge-owner in Andrew Martin.

Marathon claims also that it invested $50 million in capital expenditures in processing facilities, and that this financing is similar to the barge-owner's $350,000 expenditure on the tug. Marathon invested exclusively in facilities it owned, however, not in the 20-inch pipeline already owned by Tetco. Our finding of

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[25] id., 754 F.2d at 617, 619 (emphasis supplied). See Consolidated Aluminum Corp. v. C.F. Bean Corp., 772 F.2d 1217 (5th Cir.1985) aff'd 833 F.2d 65 (1987), cert denied, --- U.S. ---, 108 S.Ct. 2821, 100 L.Ed.2d 922 (1988).

propriety interest in Andrew Martin is, therefore, inapposite to this case. Absent injury to property it owned and a tangible contribution to the property for which it contracted, we are not prepared to permit Marathon to establish a proprietary interest on the basis that its property and TETCO's 20-inch pipeline were an integrated unit.

While Marathon's business is interconnected with TETCO's 20-inch pipeline, Marathon is like any other business that needs a railroad, ship, bridge, or pipeline to introduce its product into the stream of commerce. A producer may depend upon use of the transportation facility, but such reliance does not rise automatically to the level of

a proprietary interest in the transportation medium. Other companies' subsequent utilization of TETCO's 20-inch pipeline, as anticipated in TETCO's 1981 application to the Federal Energy Regulatory Commission, and construction of alternate "tie-in" points, as well as Marathon's ability to transport gas through its own modified 12-inch pipeline during the repair of TETCO's 20-inch pipeline, underscore the essential independence of Marathon and TETCO's enterprises: Marathon produces and sells gas; TETCO purchases and transports it.

### C. McMoRan's Claim that Faustug and Continental Indemnified It

[6] The district court rejected McMoRan's claim that Faustug, or Faustug's insurer, Continental, indemnified it

against liability for damages resulting from the rupture of TETCO's 20-inch pipeline. The court found that the parties "have not specifically, clearly, and expressly agreed that Faustug would procure P[rotection] & I[ndemnity] insurance that would function as a comprehensive liability policy in favor of McMoRan protecting McMoRan from its own acts of negligence [sic]."

The relationship between McMoRan and Faustug originated in Pennzoil's procurement of Faustug's towing services for moving the D/B OCEAN TRAVELER from Block 316 to Block 107. On November 1, 1982, Pennzoil and Faustug entered into a Blanket Towing Agreement which, in its' preface, provided that Pennzoil was acting

on behalf of itself and

> all of its subsidiaries, affiliated companies, owners, co-owners and joint-venturers associated therewith, and any of their agents, officers, and employees, hereinafter collectively referred to as 'COMPANY'...

Since Pennzoil retained a 34% ownership interest in McMoRan's lease of Block 107, McMoRan is a co-owner or joint venturer of Pennzoil in exploring this area, and hence, its right to indemnification is governed by this Blanket Towing Agreement.

Continental urges this court to hold that two separate contracts existed: one between Pennzoil and Faustug, and another between McMoRan and Faustug. Continental

relies upon the fact that Pennzoil and Faustug signed their Blanket Towing Agreement on November 1, 1982, while Pennzoil and McMoRan did not become co-owners or joint-venturers until November 10, 1982. Despite the fact that Pennzoil and McMoRan became co-owners and joint-venturers nine days after the Pennzoil-Faustug agreement, the language of the Blanket Towing Agreement is not limited to Pennzoil's co-owners or joint-venturers as of the date of the towing agreement. To see a separate contract between McMoRan and Faustug blinks reality. Faustug performed, and thought it was performing, towage services under a single contract -- the Pennzoil-Faustug Blanket Towing Agreement. As co-owner and joint-venturer of Pennzoil,

McMoRan is entitled to rely upon the Blanket Towing Agreement as an articulation of its rights.

In Article X of the Pennzoil-Faustug contract, Faustug agreed to provide hull, protection and indemnity (P&I), excess P & I, tower, and pollution insurance. Article X continues:

> Any language in the policies ... which limits the coverage afforded to an assured who is not a shipowner or who is not entitled to the rights of limitation to which a shipowner is entitled to the rights of limitation to which a shipowner is entitled shall be deleted. All of the aforesaid policies shall name COMPANY, its affiliates and subsidiaries as Additional Assureds,

> shall provide that all said insurers waive subrogation against COMPANY, its affiliates and subsidiaries.

Given the "collective[]" definition of "COMPANY" in the preface, the inclusion in Article X of "affiliates and subsidiaries" after "COMPANY" and omission of "owners, co-owners, and joint-venturers" is inexplicable. Co-owners and joint-venturers are included, however, in the term "COMPANY," according to the preface of the Blanket Towing Agreement. We, therefore, construe Article X to include co-owners and joint-venturers as additional assureds. The repetition of "affiliates and subsidiaries" does not alter the definition of "COMPANY" established in the preface to the agreement.

Article XI provides further:

In the event (1) CONTRACTOR [Faustug] should fail to secure the insurance coverages set forth in the preceding paragraphs, with or without the knowledge of COMPANY, or (2) any claims, demands, suits or causes of action, of whatever kind or nature, are brought against COMPANY which arise out of or are connected with, directly or indirectly, the performance of towing services by CONTRACTOR as provided herein, which for any reason are not covered by the insurance protection afforded COMPANY pursuant to the provisions of the preceding paragraph, then CONTRACTOR shall itself be an insurer to the extent it has failed to

comply with the obligations to provide insurance hereunder, and further agrees to defend, protect, indemnify and hold COMPANY harmless with respect to all such claims, demands, suits and causes of action even though they arise or result directly or indirectly from the sole or concurrent negligence of COMPANY, whether active or passive, primary or secondary. CONTRACTOR further agrees at its sole cost and expense to procure and continuously maintain in full force and effect throughout the term of this agreement, with reliable insurance companies, and with limits of liability as specified herein, Contractual Liability Insurance covering CONTRACTOR'S undertakings in

this agreement and particularly any undertakings set fort in this paragraph.

The description of the insurance that Faustug is responsible for providing is straightforward: hull, P & I, excess P & I, tower, and pollution. Article XI enumerates no additional forms of insurance; it states repeatedly that it applies to "the insurance coverages **set forth in the preceding paragraphs**," to Faustug's failure "to comply with the obligations to provide insurance **hereunder**," to "limits of liability **as specified herein**" (emphasis supplied). Faustug's liability for failing to obtain insurance under Article XI if restricted, therefore, to those specific forms of

insurance delineated in Article X.

The question of indemnification under Article XI thus becomes more focused: is Faustug obliged to indemnify McMoRan for damages resulting from the negligent retrieval of anchors by a non-ship-owner under Article X of the Blanket Towing Agreement? We hold that it has no such obligation.

The usual form of Protection & Indemnity insurance, which "insures only against liability resulting from **vessel ownership**,"[26] would not provide coverage for McMoRan, a shipowner. McMoRan argues, however, that Faustug's P & I insurance is

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26 Wiley v. Offshore Painting Contractors, Inc. 716 F.2d 256, 257 (5th Cir.1983) (emphasis supplied); Gryar v. ODECO, Inc., 719 F.2d 112, 116 (5th Cir.1983).

extended to non-ship-owners by the provision in Article X that "delete[s...a]ny language in the policies ... which limits the coverage afforded to an assured who is not a shipowner ..."

While this deletion clause reveals the parties' intent to extend some coverage to non-shipowners, McMoRan asks us to interpret the indemnification provision in a manner not warranted by the contractual language. There is no actual "language in the polic[y]" which can be "delete[d]" in order to cover non-ship-owners; to delete the P & I insurance provision would not help McMoRan's cause, and to keep the provision in the policy intact but expand its traditional application would go beyond the instruction to "delete[] ... language

in the polic[y]." We do not delete language in the policy by maintaining the exact text of the policy and altering only its meaning; deletion, like amendment, is different from interpretation. The interpreter's pen, McMoRan's claim demonstrates, can rewrite an entire document based on submerged intentions, but the deleter's scalpel is limited to the actual words on the written page. Finding no language in the policy to delete and unable to expand insurance coverage without a specific and clear expression of the parties' intent, [27] we conclude that the P & I insurance in Article X does not cover

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[27] See Branch v. Fidelity & Casualty Co. of New York, 783 F.2d 1289, 1294 (5th Cir.1986); Knapp v. Chevron U.S.A., Inc., 781 F.2d 1123, 1127-28 (5th Cir.1986).

McMoRan: McMoRan's negligence did not arise out of the ownership of a vessel, but out of the operation of an anchor retrieval process in which the vessel was only 'the inert locale of the injury."[28]

McMoRan is, therefore, responsible for paying its own share of the apportionment of fault. The fact that TETCO will transfer this money to Continental according to the pre-trial settlement does not violate any insurance relationship between the parties. Continental acquired TETCO's right to recover at arm's length, and TETCO was fully able to subrogate its

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28 Lanasse v. Travelers Insurance Company, 450 F.2d 580,584 (5th Cir.1971)(footnote omitted),cert denied, 406 U.S. 921, 92 S.Ct. 1779, 32 L.Ed.2d 120 (1972).

rights.[29]

**D. ODECO's Claim that McMoRan Indemnified It and ODECO's Request for Costs.**

[7] The district court rejected ODECO's claim that McMoRan indemnified it, stating that at the time of the accident, the rig was no longer moving onto location as required by the Drilling Contract between ODECO and McMoRan, and that the parties did not intend for McMoRan to indemnify ODECO for ODECO's actions off of location.

Article VIII(D) of the Drilling Contract between ODECO and McMoRan provides:

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[29] **See** Marathon Oil CO. v. Mid-Continent Underwriters, 786 F.2d 1301 (5th Cir.1986); **Wiley**, 716 F.2d at 257.

> Operator [McMoRan] agrees that Contractor [ODECO] shall be released and relieved from, and agrees to indemnify, hold harmless and defend Contractor [ODECO] against any and all losses, claims, demands, damages and liabilities resulting from or arising out of damages to wells, pipelines, flowlines and any resulting pollution, or loss of production as a result of moving the drilling unit onto or off of, or operations conducted on, Operator's [McMoRan's] designated location, unless caused by the sole negligence of Contractor [ODECO].

Since "damage[] to ...pipelines" is one of the actions for which McMoRan indemnified ODECO, and this injury was not caused by

the sole negligence of ODECO, the only issue is whether the damage caused to TETCO's 20-inch pipeline occurred as a result of moving the D/B OCEAN TRAVELER onto the designated location.

In the late afternoon of January 1, before he accident, Craft, ODECO, Faustug, and Chance all knew that the rig was three to four miles off of location. The rig had raised its No. 7 anchor that morning, and was currently engaged in raising its No. 6 anchor, in order to resume moving onto location at Block 107. The move onto location, the district court found, was not complete until final tie-in, until the survey boat provided the final position fix at Block 107 at 1 a.m. on January 5. Although a successful move onto location

was interrupted by the storm on the night of the 31st, the move as a whole was still proceeding at the time of the accident. The rig was still in transit between Blocks 316 and 107 when its No. 6 anchor ruptured TETCO's 20-inch pipeline.

McMoRan claims that the parties intended that McMoRan indemnify ODECO only for damages occurring in the area of location in Block 107. To support this argument of geographical limitation, McMoRan points to its responsibilities to ensure that the anchor pattern is free of obstructions, and to conduct bottom condition surveys. All of these activities, McMoRan reminds the court, occur on location.

These separate contractual obligations on location do not, however, encumber the independent indemnification provision which specifically covers "any and all losses." Nothing in the indemnification provision limits its scope to a certain geographical confine. Damage to pipelines while moving a drilling rig onto location need not occur at the proposed drilling site, as this case amply demonstrates. The district court's interpretation of the drilling contract, therefore, is in error and its application to the facts in this case are erroneous. Accordingly, we hold that McMoRan indemnified ODECO for ODECO's share of damages to TETCO's 20-inch pipeline. ODECO claims, and McMoRan does not challenge, that this figure amounts to $961,712.67,

accordingly to the district court's apportionment of liability which we affirm.

ODECO claims that it is entitled to costs and attorney's fees as the "prevailing party" under Fed.R.Civ.P. 54(d). Our review of the district court's denial of costs and attorney's fees, however, is "very narrow," limited to rectifying only "clear abuse[s] of discretion."[30] We find no such error.

On perhaps the most significant issue in this protracted litigation, ODECO never

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30 **In Re Nissan Antitrust Litigation**, 557 F.2d 910, 918 (5th Cir.1978), **cert denied**, 439U.S. 1072, 99 S.Ct. 843, 59 L.Ed.2d 38 (1979); Crawford Fitting Co. v. J.T. Gibbons, Inc., 48 U.S. 437, 107 S.Ct. 2494, 2497, 96 L.Ed.2d 385 (1987); United States v. Mitchell, 580 F.2d 789, 793-94 (5th Cir.1978).

even prevailed; we affirmed the district court's finding that ODECO was "rather obvious[ly]" at fault for damaging TETCO's pipeline, as negligent as both McMoRan and Chance. The district court, therefore, acted within its sound discretion when it refused to reimburse ODECO for its cost and attorney's fees.

For the foregoing reasons, the judgment of the district court is AFFIRMED in part, and REVERSED in part. As the district court held, Faustug is liable for 70%, and Chance is liable for 10%, of the damage to TETCO's 20-inch pipeline. McMoRan is liable, however, for the remaining 20% of the damage: it is responsible for its own negligence which caused 10% of the damage, and by indemnification, for ODECO's

negligence which accounted for 10% of the damage.

**APPENDIX E**

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

NOS. 87-3509, 87-3879

TEXAS EASTERN TRANSMISSION CORPORATION, Plaintiff,

V.

MCMORAN OFFSHORE EXPLORATION CO., ET AL, Defendants

In the Matter of the Complaint of TRACTUG ASSOCIATES AND FAUSTUG MARINE CORPORATION FOR EXONERATION FROM OR LIMITATION OF LIABILITY AS OWNERS OF ZP CHALONE, ZP CAYMUS AND ZP CONDON, AND ODECO, INC, Plaintiffs-Appellees,

V.

MARATHON OIL CO., ET AL
Defendants-Appellants.

MARATHON OIL CO., ET AL
Plaintiffs-Appellants,

V.

MCMORAN OFFSHORE EXPLORATION
CO., Defendant,

FAUSTUG MARINE CORP., ET AL
Defendants-Appellees.

TEXAS EASTERN TRANSMISSION
CORPORATION, Plaintiff-Appellee,
V.

MCMORAN OFFSHORE EXPLORATION
CO., Defendants.

FAUSTUG MARINE CORP., OCEAN
DRILLING & EXPLORATION CO.,
CONTINENTAL INSURANCE COMPANY
AND TRACTUG ASSOCIATES, Defendants,
V.

JOHN E. CHANCE & ASSOCIATES,
INC., Defendant-Appellant.

IN THE MATTER OF THE COMPLAINT OF
TRACTUG ASSOCIATES AND FAUSTUG
MARINE CORPORATION FOR EXONERATION
FROM OR LIMITATION OF LIABILITY
AS OWNERS OF THE ZP CHALONE,
ZP CAYMUS AND ZP CONDON, and
ODECO, INC., Plaintiffs-Appellees,

V.

MARATHON OIL CO., and
MCMORAN OFFSHORE EXPLORATION
CO., Defendants-Appellants,

MARATHON OIL CO., ET AL
Plaintiffs-Appellants,

v.

MCMORAN OFFSHORE EXPLORATION
CO., ET AL, Defendants-Appellees

CONTINENTAL INSURANCE COMPANY
Defendants-Appellant,

V.

MCMORAN OFFSHORE EXPLORATION
CO., ET AL, Defendants-Appellees

April 24, 1989
871 F.2d 27 (5th Cir. 1989)

Appeals from the United States District Court for the Eastern District of Louisiana, Marcel Livaudais, Jr., Judge

(Opinion January 3, 1989, 5th Cir. 1989, 863 F.2d 355)

ON PETITIONS FOR REHEARING
AND SUGGESTIONS FOR
REHEARING EN BANC

Before RUBIN, GARZA, and KING, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge:

Marathon's petition for rehearing en banc is denied.

ODECO's petition for rehearing to increase its award is denied. Prior to trial, TETCO settled its claim against ODECO, Faustug, and Continental for $9.5 million, assigning to these companies its remaining rights against McMoRan, Chance and Arthur Levy.

Ordinarily, ODECO's payment in pre-trial settlement, if reasonable, would be the measure of its losses and liabilities, and McMoRan, as indemnitor, would be obliged to indemnify ODECO for that amount.

ODECO's payment to TETCO, however, not only settled TETCO's claim against ODECO, but was the consideration for TETCO's assignment to ODECO of claims against McMoRan and Chance. ODECO thus acquired TETCO's right to recover a portion of McMoRan's and Chance's liability for damaging TETCO's pipeline. Neither the agreement nor any information in the record gives us any basis to determine what portion of ODECO's settlement with TETCO represents its own liability for damaging TETCO's pipeline and what amount represents the value of the right to pursue TETCO's claim against non-settling tort feasors. We, therefore, hold that McMoRan's indemnification of ODECO amounts to $961,712.67, ODECO's liability as

determined by the district court.

McMoRan's application for rehearing and ODECO's application for rehearing to award it attorney's fees, costs, and expenses having been considered, the court's original opinion is modified as follows:

The last line of the first paragraph of the opinion at page 1526 [863 F.2d at 357] is modified to read as follows:

We affirm the judgment of the district court in all but the last of these determinations.

The second full paragraph beginning on the slip opinion at page 1539 [863 F.2d at 368] and the three succeeding paragraphs are withdrawn, and the following four paragraphs are substituted:

The question of insurance under Article XI thus becomes more focused: does Article X of the Blanket Towing Agreement oblige Faustug to insure McMoRan for damages resulting from the negligent retrieval of anchors by a non-ship-owner? We hold that it does not.

The usual form of Protection & Indemnity insurance, which "insures only against liability resulting from vessel ownership"[31] would not provide coverage for McMoRan, a non-ship-owner. McMoRan argues, however, that Faustug was obliged to furnish a P & I policy covering non-ship-

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31 Wiley v. Offshore Painting Contractors, Inc., 716 F.2d 456, 257 (5th Cir. 1983) (emphasis supplied); Grayar v. Odeco, Inc., 719 F.2d 112, 116 (5th Cir. 1983).

owners because of the provision in article X that "deleted... [a]ny language in the policies ... which limits the coverage afforded to an assured who is not a shipowner..." (emphasis added).

McMoRan asks us to interpret the clause in a manner not warranted by the contractual language. While Article X reveals that the parties intended to require Faustug to obtain insurance extending some coverage to non-ship-owners, it effect is limited: it requires only the deletion of limiting clauses. There is no "language in the polic[y]," however, that can be "deleted" to make it cover non-ship-owners. We do not delete language in the policy by maintaining the exact text of the policy and altering only its meaning;

deletion, like amendment, is different from interpretation. The interpreter's pen, McMoRan's claim demonstrates, can rewrite an entire document based on submerged intentions, but the deleter's eraser is limited to the actual words on the written page. Finding no language in the policy to delete and unable to expand insurance coverage beyond its traditional application without a specific and clear expression of the parties' intent,[32] we conclude that Faustug did not violate the contract by failing to provide P & I insurance. Any P & I insurance that Faustug might have

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32 See Branch v. Fidelity & Casualty Co. of New York, 783 F.2d 1289, 1294 (5th Cir. 1986); Knaap v. Chevron U.S.A., Inc., 781 F.2d 1123, 1127-28 (5th Cir. 1986).

obtained would not have covered McMoRan's negligence, since McMoRan's negligence did not arise out of the ownership of a vessel, but out of the operation of an anchor retrieval process in which the vessel was only "the inert locale of the injury."[33]

While Faustug did not provide McMoRan with P & I insurance, McMoRan claims in the alternative that Faustug had agreed to indemnify it. The Blanket Towing Agreement does, in fact, provide that Faustug

> agrees to defend, protect, indemnify and hold [McMoRan] harmless with respect to all... claims, demands, suits and causes of action ... of whatever kind or nature, [that] are brought against

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33 Lanasse v. Travelers Insurance Company, 450 F.2d 580, 584 (5th Cir. 1971) cert. denied, 406 U.S. 921, 92 S.Ct. 1779, 32 L.Ed. 2d 120 (1972) (footnote omitted).

> [McMoRan] which arise out of or are connected with, directly or indirectly, the performance of towage services by [Faustug] ...

Because this suit arouse our of Faustug's towage of the D/B OCEAN TRAVELER, Faustug and its insurer, Continental, are obliged to indemnify McMoRan against all claims, demands, suits and causes of action against it. Faustug is, therefore, responsible for paying McMoRan's share of the apportionment of fault.

The last line in the second full paragraph on pages 1541 [863 F.2d at 370] is modified as follows, and another sentence, with two footnotes, is inserted directly after it:

The district court, therefore, acted within its sound discretion when it refused to reimburse ODECO for its costs and

attorney's fees pursuant to Rule 54(b). ODECO is entitled to attorney's fees, costs, and expenses incurred as a defendant and plaintiff indemnitee in a tort suit,[34] but it "'enjoys no right to recover its legal fees incurred in establishing its right to indemnification.'"[35]

In addition, the last paragraph of the opinion, appearing on page 1541 [863 F.2d at 370], is modified to read as follows:

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34 Signal Oil & Gas Co. v. Barge W-701, 654 F.2d 1164, 1178 (5th Cir. 1981), cert. denied, 455 U.S. 944, 102 S.Ct. 1441, 71 L.Ed.2d 656 (1982).

35 Weathersby v. Conoco Oil Co., 752 F.2d 953, 959 (5th Cir. 1984) (citing Signal Oil & Gas Co., 654 F.2d at 1178).

For the foregoing reasons, the judgment of the district court is AFFIRMED in part, REVERSED in part, and REMANDED in part. As the district court held, Chance is liable for 10% of the damage to TETCO's 20-inch pipeline, Faustug is liable for 80% of the damage: it is responsible or its own negligence which caused 70% of the damage and, by indemnification, for McMoRan's negligence, which accounted for 10% of the damage. In addition, because McMoRan agreed to indemnify ODECO, McMoRan is liable for the damage caused by ODECO's negligence, or 10% of the damage to TETCO's pipeline. On remand, the district court shall determine the amount of attorney's fees, costs, and expenses to which ODECO is entitled. In making this calculation, it

shall not reimburse ODECO for the attorney's fees and costs it incurred in prosecuting its claim for indemnity and contribution against McMcRan.

The Petitions for Rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35 the Suggestion for Rehearing En Banc is DENIED.

**APPENDIX F**

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

NOS. 87-3509, 87-3879

TEXAS EASTERN TRANSMISSION
CORPORATION, Plaintiff,

V.

MCMORAN OFFSHORE EXPLORATION
CO., ET AL, Defendants

In the Matter of the Complaint of
TRACTUG ASSOCIATES AND FAUSTUG
MARINE CORPORATION FOR EXONERATION
FROM OR LIMITATION OF LIABILITY
AS OWNERS OF ZP CHALONE, ZP CAYMUS
AND ZP CONDON, AND ODECO, INC,
Plaintiffs-Appellees,

V.

MARATHON OIL CO., ET AL
Defendants-Appellants.

MARATHON OIL CO., ET AL
Plaintiffs-Appellants,

V.

MCMORAN OFFSHORE EXPLORATION
CO., Defendant,

FAUSTUG MARINE CORP., ET AL
Defendants-Appellees.

TEXAS EASTERN TRANSMISSION
CORPORATION, Plaintiff-Appellee,

V.

MCMORAN OFFSHORE EXPLORATION
CO., Defendants.

FAUSTUG MARINE CORP., OCEAN
DRILLING & EXPLORATION CO.,
CONTINENTAL INSURANCE COMPANY
AND TRACTUG ASSOCIATES, Defendants,

V.

JOHN E. CHANCE & ASSOCIATES,
INC., Defendant-Appellant.

IN THE MATTER OF THE COMPLAINT OF
TRACTUG ASSOCIATES AND FAUSTUG
MARINE CORPORATION FOR EXONERATION
FROM OR LIMITATION OF LIABILITY
AS OWNERS OF THE ZP CHALONE,
ZP CAYMUS AND ZP CONDON, and
ODECO, INC., Plaintiffs-Appellees,

V.

MARATHON OIL CO., and
MCMORAN OFFSHORE EXPLORATION
CO., Defendants-Appellants,

MARATHON OIL CO., ET AL
Plaintiffs-Appellants,

v.

MCMORAN OFFSHORE EXPLORATION
CO., ET AL, Defendants-Appellees

CONTINENTAL INSURANCE COMPANY
Defendants-Appellant,

V.

MCMORAN OFFSHORE EXPLORATION
CO., ET AL, Defendants-Appellees

May 26, 1989

Various claims were asserted in connection with rupture of undersea pipeline during relocation of drilling rig

platform. The United States District Court for Eastern District of Louisiana, Marcel Livaudais, Jr., apportioned fault among parties that participated in relocation operation and denied gas producer's claim for loss of production and appeals followed. The Court of Appeals, 863 F.2d 355, affirmed in part and reversed in part. After gas producer's motion for rehearing was denied, 871 F.2d 27, tugboat operator and its insurer filed petitions for rehearing and suggestion for rehearing in bank. The Court of Appeals, Alvin B. Rubin, Circuit Judge, held that claims against drilling rig platform operator for damages caused when drilling rig's anchor ruptured gas pipeline during attempt to relocate platform arouse out of and were

connected with tugboat owner's performance of towing services, obligating tugboat owner to indemnify rig operator.

Hearing denied.

**Indemnity** 13,2(7)

Claims against drilling rig platform operator for damages caused when drilling rig's anchor ruptured gas pipeline during attempt to relocate platform arouse out of and were connected with tugboat owner's performance of towing services, obligating tugboat owner to indemnify rig operator; operator's negligent retrieval of anchor was direct and necessary precursor to recommencing tugboat owner's towage services.

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Appeals from the United States
District Court for the Eastern
District of Louisiana.

On Petitions for Rehearing and
Suggestion for Rehearing En Banc

(Opinion April 24, 1989, 5th
Cir. 1989, 871 F.2d 27)

Before RUBIN, GARZA, and KIND, Circuit Judges.

ALVIN B. RUBIN, Circuit Judge.

In Lanasse v. Travelers Insurance Co.[36] we did not require indemnification because the indemnitee's negligence, which proximately caused the injury, was "not even remotely related to the operation ... of the [indemnitor's] vessel". In this case, Faustug was towing the drilling rig

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[36] 450 F.2d 580, 584 (5th Cir. 1971), cert denied, 406 U.S. 921, 92 S.Ct. 1779, 32 L.Ed. 2d 120 (1972).

to its final destination, the towing was interrupted by an interlude in which the drilling rig released its anchors, and McMoRan retrieved the anchors so that Faustug might resume towage services. McMoRan's negligent retrieval of the anchors, one of many causes of the casualty, was the direct and necessary precursor to recommencing Faustug's towage services. The claims brought against McMoRan, therefore, arose out of and were connected with Faustug's performance of towage services, and Faustug is obliged to indemnity it.

Whether Continental and ODECO should recover the $950,118.47 paid for their release is, as Continental states in its application for rehearing, an issue that is

unnecessary for us to reach, and we intimate no opinion on it.

Continental Insurance Company's and Faustug's petitions for rehearing are therefore DENIED and no member of the panel of Judge in regular active service of this court having requested that the Court be polled on hearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

(4)

Supreme Court, U.S.
FILED
OCT 5 1989
JOSEPH F. SPANIOL, JR.
CLERK

# NO. 89-460

# In the Supreme Court of the United States

OCTOBER TERM 1989

MARATHON OIL COMPANY

Petitioner

VERSUS

McMORAN OFFSHORE EXPLORATION COMPANY, ET AL

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI ON BEHALF OF RESPONDENT ODECO, INC.

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24pp

## QUESTIONS PRESENTED

Correctly stated, Marathon Oil Company's Petition for Writ of Certiorari raises the following issues for review:

1. Whether the U.S. Court of Appeals for the Fifth Circuit correctly interpreted and applied the rule in *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927), to dismiss the claim presented by Petitioner for purely economic losses allegedly sustained following a rupture to an offshore natural gas pipeline in which it did not have an ownership or proprietary interest.

2. Whether Petitioner is entitled to recover its claim for purely economic damages allegedly sustained when a natural gas pipeline ruptured during an offshore oil rig move operation, when Petitioner did not own or operate or have any proprietary interest whatsoever in that pipeline and where Petitioner itself did not suffer any physical damage as a result of that casualty.

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## STATEMENT OF THE CASE

The facts of the case are thoroughly set forth in the opinion of the United States Court of Appeals for the Fifth Circuit, 877 F.2d 1214 (5th Cir. 1989). Marathon Oil Company's relationship to this incident is reported specifically at pages 1219-20 and 1223-26 of the opinion.

On January 1, 1983, an underwater pipeline was damaged during the relocation of an offshore drilling rig in the Gulf of Mexico. Texas Eastern Transmission Corporation (TETCO) was the sole owner and operator of that pipeline. The TETCO 20-inch natural gas pipeline extended from South Pass Block 89 across the seabed of the Gulf of Mexico through West Delta Block 105 across to Venice Station in southeast Louisiana.

TETCO constructed the pipeline in 1981 following Marathon's discovery of natural gas in South Pass 89. However, TETCO constructed the pipeline not only to provide access to Marathon's gas reserves in South Pass Block 89, but also to transport natural gas for other producing companies operating in that area of the Gulf; TETCO in fact constructed several "tie-in" points along its pipeline to transport the gas produced by other companies. TETCO constructed the pipeline at its sole cost; none of the producing users of that pipeline, including Marathon, contributed any amounts towards the pipeline's construction, nor did they otherwise participate in its construction. TETCO had the sole responsibility for the operation, maintenance, and repair of the pipeline.

Following the casualty, TETCO shut in its pipeline for a substantial period of time until it could be repaired. During that interval, no natural gas was transported through the pipeline. As a result, Marathon Oil Company

brought suit against those companies involved in the ill-fated rig move, and claimed for purely economic losses in the form of deferred oil and gas production allegedly suffered as a result of its inability to use the TETCO pipeline. Marathon did not claim for nor did Marathon suffer any physical damage to its platform or to any of its other property which was adjoined to the TETCO pipeline.

The District Court, Judge Marcel Livaudais, dismissed Marathon's claim, relying on the rule enunciated in *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927), as interpreted and applied by the U.S. Court of Appeals for the Fifth Circuit in *State of Louisiana ex rel. Guste v. M/V TESTBANK*, 752 F.2d 1019 (5th Cir. 1985).

On appeal, Marathon presented several arguments that it had a "proprietary interest" in the pipeline, such that it should be allowed to recover notwithstanding the *Robins/TESTBANK* rule. The Court of Appeals, however, rejected these arguments as having no factual merit. 877 F.2d at 1223-26. The Fifth Circuit affirmed the District Court's conclusion that Marathon had no ownership or proprietary interest whatsoever in the TETCO pipeline, commenting that the evidence "underscored the essential independence of Marathon and TETCO's enterprises: Marathon produces and sells gas; TETCO purchases and transports it." 877 F.2d at 1226.

## REASONS FOR DENYING THE WRIT OF CERTIORARI

I. Petitioner's appeal does not raise any issues of law which require the Supreme Court's intervention. Petitioner does not articulate any "special and important reasons" to support its contention that this Court should exercise its discretionary power of review as

review as described in Supreme Court Rule 17. There are no issues of constitutional law; there are no issues involving a conflict of federal statutory or federal common law; and there are no issue involving a conflict concerning federal maritime law.

II. The decision below is in full accord with the rule enunciated by this Court in *Robins Dry Dock & Repair Co., v. Flint*, 275 U.S. 303 (1927). The decision below is entirely consistent with the Fifth Circuit's previous applications of the *Robins* rule, and the decision below is entirely consistent with the treatment of the *Robins* rule given by the other federal circuits. There is no conflict in the federal circuits concerning the interpretation or application of the *Robins* rule.

III The decision below is not in direct or indirect conflict with the Louisiana Supreme Court's decision in PPG Industries, Inc. v. Bean Dredging, 447 So. 2d 1058 (La. 1984). The Louisiana Supreme Court was not called upon to decide a federal question, but was instead called upon to interpret state law, although that state law previously had been based entirely on the *Robins* rule. Instead of a conflict, the Louisiana Supreme Court's decision and rationale fully vindicates the continued vitality of the *Robins* rule.

IV. In *East River Steamship Corp. v. Transamerica Delaval Inc.*, 476 U.S. 858 (1986), this Court recently acknowledged the continued utility of the *Robins* rule.

## ARGUMENT

Petitioner seeks a writ of certiorari on two grounds:

(1) Relying on Supreme Court Rule 17.1(a), Petitioner argues that the Fifth Circuit's decision below is in direct conflict with the decisions of the various federal circuits in their interpretation and application of this Court's rule in *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303 (1927);

(2) Relying on Supreme Court Rule 17.1(a), Petitioner argues that the Fifth Circuit's decision below is in direct conflict with the Louisiana Supreme Court's decision in *PPG Industries Inc. v. Bean Dredging*, 447 So. 2d 1058 (La. 1984), Petitioner alleging that the Fifth Circuit and the Louisiana Supreme Court have decided a federal question in a conflicting and inconsistent manner.

Respondents submit that the Court should exercise its discretion to deny the writ of certiorari. Petitioner's arguments in support of its petition have no legal or factual merit, and petitioner's alleged grounds supporting the writ are totally illusory.

### I.

Petitioner's appeal does not raise any questions of law which require the Supreme Court's intervention. Petitioner does not articulate any "special and important reasons" to support its argument that this Court should exercise its discretionary power of review, as described in Supreme Court Rule 17. There are no issues of Constitutional law; there are no issues involving a conflict of federal statutory or federal common law; and there are no issues involving a conflict concerning federal maritime law.

Certiorari should not be granted since this case does not involve any legal principles of any public importance. See *Rice v. Sioux City Memorial Park Cemetery* 349 U.S. 70, 79 (1955). Instead, the principles involved herein are only factual in nature and then only among the parties to this litigation rather than the public at large.

Supreme Court Rule 17 provides that a review on writ of certiorari is a matter of judicial discretion, and will only be granted "when there are special and important reasons therefor." Admittedly, Rule 17 does not fully measure or limit the Court's discretion, but Rule 17 nevertheless implies that there must be a substantial federal question presented to warrant the granting of certiorari. A substantial federal question is totally lacking in Petitioner's appeal. Petitioner does not raise any evidence that the Fifth Circuit's decision below has "so far departed from the accepted and usual course of judicial proceedings, or so far has sanctioned such a departure by the lower court" as to warrant an exercise of this Court's power of supervision. On the contrary, the Fifth Circuit's decision is in complete accord with this Court's decision in *Robins Dry Dock & Repair Co. v. Flint*, with its own previous interpretations and applications of the *Robins* precedent, and with the interpretation and application given that precedent by the other federal circuit courts of appeal. Quite simply, there exists no reasons to justify granting the writ of certiorari.

## II.

There is no need for this Court to grant the writ of certiorari, since there does not exists any genuine or direct conflict among the federal circuit courts of appeal in the application and interpretation of this Court's decision in *Robins Dry Dock & Repair Co. v. Flint.* The decision below is entirely consistent with the Fifth Circuit's previous con-

siderations of the *Robins* rule and with the other federal circuit courts of appeals' treatment of the *Robins* rule.

The decision below was based on this Court's ruling in *Robins Dry Dock & Repair Co. v. Flint,* 275 U.S. 303 (1927), and based on the Fifth Circuit's application of the *Robins* precedent in *State of Louisiana ex rel. Guste v. M/V TESTBANK,* 752 F.2d 1019 (5th Cir. 1985) [en banc]. In *Robins,* a time chartered vessel was damaged while in drydock as a result of the negligence of the ship's repairer; this damage to the ship extended the repair period and the time charterer's nonuse of the vessel. The time charterer, who was contractually obligated to pay the shipowner charter hire during the repair, sued the ship repairer for the delay encountered by these extended repairs. The Supreme Court denied the time charterer recovery, holding that the time charterer did not have a property interest in the vessel authorizing recovery against the ship repairer for its negligence in causing the delay. The Supreme Court stated:

> The damage was material to them [time charterers] only as it caused the delay in making the repairs, and that delay would be a wrong to no one except for the petitioner's contract with the owners. The injury to the propeller was no wrong to the respondents but only to those to whom it belonged. But suppose the respondents' loss flowed directly from that source. Their loss arose only through their contract with the owners — and while intentionally to bring about a breach of contract my give rise to a cause of action, [citation omitted] no authority need be cited to show that, as a general rule, at least, a tort to the person or property of one man does not make the tortfeasor liable to another merely because the injured person was under a contract with that other unknown to the doer of the wrong. [Citations omitted.] The law does not spread its protection so far.

> . . . But justice does not permit that the petitioner be charged with the full value of the loss of use unless there is someone who has a claim to it as against the petitioner. Respondents have no claim either in contract or in tort, and they cannot get a standing by the suggestion that if someone else had recovered it, he would have been bound to pay over a part by reason of his personal relations with the respondents.

275 U.S. at 308-309.

Although the U.S. Court of Appeals for the Fifth Circuit routinely had considered the *Robins* rule on several earlier occasions, in *State of Louisiana ex rel. Guste v. M/V TESTBANK,* 752 F.2d 1019 (5th Cir. 1985), the Fifth Circuit en banc thoroughly analyzed the *Robins* precedent and its rationale in light of present day public policy considerations, and concluded that the *Robins* rule remained a "pragmatic limitation . . . upon the tort doctrine of foreseeability." 752 F.2d at 1023. Otherwise, concluded the Fifth Circuit, allowing recovery for mere loss of an economic expectancy in the absence of physical damage to one's property would result in a rule that had no determinable measure on the limit of foreseeability, and consequently, liability would be limitless. 752 F.2d at 1024.

Simply stated, the *Robins/TESTBANK* rule states that a party who has no ownership or proprietary interest in the damaged property may not recover in maritime tort against a tortfeasor for purely economic losses not associated with physical damage, where the tortfeasor's interference in the party's contractual rights is not intentional and where the tortfeasor had no knowledge of the contract's existence. In other words, a claimant cannot recover in maritime tort for purely economic losses unassociated with physical damage to property in which

the claimant has no ownership or proprietary interest. Applied to the facts and evidence in the case below, the Fifth Circuit properly dismissed Petitioner's claim for purely economic losses in the form of deferred oil and gas production, since Marathon had no ownership or proprietary interest in the damaged TETCO pipeline.

Petitioner's suggestion that the Fifth Circuit's decision below is in direct conflict with the *Robins* decision, or that it is in direct conflict with the application of that precedent by the various federal circuits, is totally without merit. The decision below is entirely consistent with the approach and application given *Robins* by all of the federal circuit courts of appeal.

The Fifth Circuit has had the most opportunity to consider and review the continued viability of the *Robins* rule, and in each instance, the Fifth Circuit has been consistent in its approach and application of *Robins*. See *State of Louisiana ex rel. Guste v. M/V TESTSBANK*, 752 F.2d 1019 (5th cir. 1985) [reviewing *Robins* jurisprudence among the circuits]. In those cases where the claimant has sought purely economic damages not associated with physical injury, recovery has been consistently denied where the claimant failed to establish an ownership or proprietary interest in that property or where the plaintiff failed to establish that its damages were suffered as a direct and proximate result of the defendant's tortious activity. See *Mathiesen v. M/V OBELIX*, 817 F.2d 345 (5th cir. 1987); *Cargill Inc. v. Doxsford & Sunderland Ltd.*, 782 F.2d 496 (5th Cir. 1986); *State of Louisiana ex rel. Guste v. M/V TESTBANK*, 752 F.2d 1019 (5th Cir. 1985); *Akron Corp. v. M/V CANTIGNY*, 706 F.2d 151 (5th Cir. 1983); *Louisville & Nashville R.R. Co. v. M/V BAYOU LACOMBE*, 597 F.2d 469 (5th Cir. 1979); *Dick Meyers Towing Service v. United States*, 577 F.2d 1023 (5th Cir. 1978); *Kaiser Aluminum*

*Chemical Corp. v. Marshland Dredging Co.*, 455 F.2d 957 (5th Cir. 1972). See *In re Lloyd's Leasing Ltd. v. Conoco*, 868 F.2d 1447 (5th Cir. 1989). On the other hand, recovery has been allowed where the claimant established that it suffered, along with its economic damages, physical injury to property in which it had an ownership or proprietary interest. *Domar Ocean Transportation Ltd. v. M/V ANDREW MARTIN*, 754 F.2d 616 (5th Cir. 1985) [held, under facts of this case, owner of tug in integrated tug/tow unit had a proprietary interest in the barge; *Rogers Terminal & Shipping Corp. v. International Grain Transfer Inc.*, 672 F.2d 464 (5th Cir. 1982) [owner of floating grain elevator entitled to recover damages suffered as a result of collision, notwithstanding that floating grain elevator was under bareboat charter]; *Vicksburg Towing Co. v. Mississippi Marine Transport Co.*, 609 F.2d 176 (5th Cir. 1980) [owner of barge unloading facility entitled to recover lost rentals suffered when its facility was damaged in collision].

The Fifth Circuit's decision below is also entirely consistent with the application of the *Robins* rule in the First, Second, Third, Fourth, Sixth, Ninth and Eleventh Circuit Courts of Appeal. In *Barber Lines A/S v. M/V DONAU MARU*, 764 F.2d 50 (1st Cir. 1985), the First Circuit adopted the same approach to *Robins* as did the Fifth Circuit in *TESTBANK*. In fact, the First Circuit specifically rejected the view advocated by the dissent in TESTBANK. Therefore, the decision below cannot be construed to be in conflict with the First Circuit's approach to *Robins*.

Petitioner cites the Second Circuit's decision in *In re Kinsman Transit Co.*, 388 F.2d 821 (2d Cir. 1968) in support of its contention that there is a conflict in circuits. In *Kinsman*, the district court mechanically applied *Robins* to deny claimant's economic damages suffered as a result

of a factually complicated vessel breakaway. On appeal, the Second Circuit affirmed the lower court's ruling dismissing the claim, but chose instead to apply a "foreseeability-proximate cause" analysis. Nevertheless, the result was the same — the claims were dismissed. Furthermore, the Second Circuit's analysis vindicated the rationale behind the *Robins* rule; a close examination of the Second Circuit's opinion demonstrates that at the end of its analysis, the Second Circuit was forced to rely on *Robins*. See 388 F.2d at 825.

Nevertheless, there is no conflict between the Second and Fifth circuits in their approach to or application of the *Robins* rule. Prior to *Kinsman*, Judge Learned Hand fully embraced the *Robins* precedent and analysis in *Agwilines Inc. v. Eagle Oil & Shipping Co.*, 153 F.2d 869 (2d Cir. 1946). Moreover, subsequent to *Kinsman* the Second Circuit fully embraced the *Robins* rule to deny a time charter recovery for purely economic losses. *Federal Commerce & Navigation Co. v. M/V MARATHONIAN*, 392 F. Supp. 908 (S.D.N.Y. 1975), *aff'd*, 538 F.2d 907 (2d Cir. 1975). Quite simply, the decision below is not in conflict with the Second Circuit's approach to *Robins*.

Nor is the decision below in conflict with the Third Circuit's application of *Robins*. In *Getty Refining & Marketing Co. v. M/T FADI B*, 766 F.2d 829 (3d Cir. 1985), the Third Circuit fully embraced *Robins* and the Fifth Circuit's decision in *TESTBANK*. The third Circuit went on to note that the *Robins/TESTBANK* analysis was in accord with the *Restatement (Second) of Torts*, §766C (1977). See 766 F.2d at 831-32. Had the instant case been before the Third Circuit, the result would have been the same — the dismissal of the claim.

Petitioner argues that the decision below is in con-

flict with the Fourth Circuit's approach to *Robins*, citing *Venore Transportation Co. v. M/V STRUMA*, 583 F.2d 708 (4th Cir. 1978), in support of its contention. Petitioner's contention is without merit. In *Venore*, the Fourth Circuit permitted the time charterer to recover for economic damages in the form of loss of use of the vessel during the vessel's repair on the grounds that the charter party had in fact transferred the risk of loss of use of the vessel from the owner to the time charterer. In this sense, the time charterer then had a "proprietary interest" in the vessel by virtue of the charter party's terms and conditions. Furthermore, as noted by the Fourth Circuit, *Venore* is factually distinguishable from *Robins* by virtue of the "character of the claim asserted" in the two cases. In *Robins*, the time charterer sought to recover for lost profits suffered while the vessel was undergoing repairs, although the time charterer had not in fact paid any charter hire during that repair period. However, in *Venore*, the time charterer had actually paid charter hire and was seeking to recover for the loss of use of the vessel.

Nevertheless, *Venore* does not stand for the proposition, as suggested by petitioner, that there is a conflict within the circuits. Without citing *Robins*, the Fourth Circuit in *In re Marine Navigation Sulphur Carriers Inc.*, 638 F.2d 700 (4th Cir. 1981), applied the *Robins* rule to deny a towage service's claim for business interruption and loss of trade damages allegedly suffered when the defendant's vessel struck a bridge closing the river to marine traffic (including plaintiff's business). Applying *Robins* or applying *TESTBANK* or applying any of the other decisions applying *Robins* would have reached the same result: namely, dismissal of a claim for purely economic losses not associated with physical damage to property in which the claimant had a proprietary interest.

There is no conflict in the Sixth Circuit. Petitioner suggests that the Sixth Circuit's decision in *In re Bethlehem Steel Corp.*, 631 F.2d 441 (6th Cir. 1980), establishes a conflict within the circuits. Petitioner's contention is without merit, since the Sixth Circuit's decision was based on Canadian law, and not on American maritime law. Furthermore, the result still would have been the same had *Robins* been applied, namely, the rejection of the claim. Here, an American ship collided with a highway bridge located wholly within the territorial boundaries of Canada. The Sixth Circuit applied the Canadian Shipping Act to dismiss the claims of various vessel owners and charterers whose vessels were detained by reason of the closure of the highway bridge. Although applying Canadian law, the result would not have been different had the U.S. *Robins* rule been applied. See *In re Kingston Shipping Co.*, 667 F.2d 34 (11th Cir. 1982); *Akron Corp. v. M/V CANTIGNY*, 706 F.2d 151 (5th Cir. 1983). Moreover, there is precedent within the Sixth Circuit that the district courts follow the Fifth Circuit's approach to *Robins*. See *In re Great Lakes Towing Co.*, 395 F. Supp. 810 (N.D. Ohio 1974).

Petitioner does not comment on whether there exists a conflict with the Eighth Circuit. However, the United States District Court for the Eastern District of Missouri twice has been faced with *Robins* issues, and in both instances, has resolved those questions by applying a *Robins/TESTBANK* analysis. *Cahokia Marine Service Inc. v. American Barge & Towing Co.*, 635 F. Supp. 830 (E.D.Mo. 1986), *aff'd without published opinion*, 815 F.2d 711 (8th cir. 1987). *cert. denied*, 108 S.Ct. 141 (1987). See also, *In re Williamson Leasing Co.*, 577 F. Supp. 890 (E.D.Mo. 1984) [adopting Fifth Circuit's pre-*TESTBANK* decisions].

Petitoner incorrectly states that there exists a conflict with the Ninth Circuit, Petitioner relying on the Ninth

Circuit's decision in *Union Oil Co. v. Oppen*, 501 F.2d 558 (9th Cir. 1974) in support of its contentiion. There, the Ninth Circuit established a purported "exception" to the *Robins* rule when commercial fishermen suffer damage to their fishing grounds as a result of an oil spill. This "commercial fisherman" exception is severely limited in scope, but certainly is not relevant to the instant appeal. Marathon's petition does not present facts to fall within the scope of this commercial fisherman "exception." Nor does this "exception" constitute a conflict within the circuits, since this "exception" to *Robins* was recognized by the en banc Fifth Circuit in *State of Louisiana ex rel. Guste v. M/V TESTBANK*, 752 F.2d 1019, 1021 (5th Cir. 1984). In fact, the district court in *TESTBANK* granted recovery to the commercial fishermen on th basis of that exception, but denied recovery to all of the other claimants. See *State of Louisiana ex rel. Gustse v. M/V TESTBANK*, 524 F.Supp. 1170 (E.D.La. 1981).

There is certainly no conflict between the Fifth Circuit's treatment of *Robins* in the decision below and the Eleventh Circuit's treatment of *Robins*. See *In re Hercules Carriers Inc.*, 720 F.2d 1201 (11th Cir. 1983), *aff'd on rehearing*, 728 F.2d 1359 (11th Cir. 1984), *cert. denied*, 469 U.S. 835 (1984); *In re Kingston Shipping Co.*, 667 F.2d 34 (11th Cir. 1982).

## III.

There is no "direct or apparent" conflict between the Fifth Circuit's decision below and the decision of the Louisiana Supreme Court in *PPG Industries, Inc. v. Bean Dreging*, 447 So. 2d 1058 (1984). Although maritime law may have been the applicable law, the Louisiana Supreme Court addressed the *Robins* question as a matter of Louisiana state law. In *PPG Industries, Inc.*, the lower court

mechanically applied the *Robins* rule as state law based on the Louisiana Supreme Court's earlier decision in *Forcum-James Co. v. Duke Transportation Co.*, 93 So. 2d 228 (La. 1957). The Louisiana Supreme Court affirmed the ruling of the lower court dismissing the pipeline customer's claim for loss of use of a damaged pipeline. However, the Louisiana Supreme Court rejected a "mechanical application" of the *Robins/Forcum* rule, and instead elected to pursue a "duty-risk" tort analysis required under Louisiana tort doctrine. However, in doing so, the Louisiana Supreme Court reached the same result had a "mechanical application" of *Robins* been used, thereby vindicating the rationale and public policy behind the *Robins* doctrine. Surely, the Louisiana Supreme Court's decision in *PPG Industries Inc.*, cannot be used as a basis to support the granting of Petitioner's application for a writ of certiorari.

## IV.

Petitioner also suggests that this Court has been inconsistent in its application of *Robins*, petitioner relying on this Court's decision in *Aktieselskabet Cuzco v. The SUCARSECO*, 294 U.S. 394 (1935). Petitioner's suggestion is without merit. In the *SUCARSECO*, a Norwegian ship collided with an American ship on the high seas as a result of the mutual fault of both vessels. Following the collision, the Norwegian ship was forced into a port of refuge to undergo necessary repairs. In order to carry out these repairs, a portion of the ship's cargo had to be discharged; upon completion of these repairs, the cargo was reloaded and the ship completed her voyage. The ship subsequently declared a general average. Cargo owners, who were forced to contribute to the general average, filed suit against the American ship for reimbursement of their general average contributions. The American ship sought to escape liability by relying on *Robins*. However, the Supreme Court rejected this defense, stating:

> The contention as to remoteness is but another way of presenting the same question. This is not a case of an attempt, by reason of "a tort to the person or property of one man," to make the tort-feasor liable to another "merely because the injured person was under a contract with that other, unknown to the doer of the wrong." See *Robins Dry Dock & Repair Co. v. Flint* [citation omitted]. Here, cargo as well as ship was placed in jeopardy. That jeopardy was due in part to the negligence of the vessel against which the claim is made. The fact that the vessel and the cargo under the "Jason Clause" bear their proportionate shares of the expenses gives to *SUCARSECO* no ground for a contention that the expenses themselves, or the share that cargo bears, were not occasioned directly by the tort. In the light of the nature of the general average contributions, and of the event which made them necessary, the fact that they were made under the stipulation in the "Jason Clause" is no more a defense to *SUCARSECO* than is the fact that the cargo was placed on board under a contract to carry it. Indeed, *SUCAESECO* makes no contention of immunity. The question arises only because, through recovery by the cargo owner from *SUCARSECO,* Toluma's share of the ultimate division is effected. But that does not establish remoteness.

294 U.S. at 404-405.

In *SUCARSECO,* the cargo owners were permitted to recover against the noncarrying vessel because their damages (general average contributions) were suffered as a direct result of the noncarrying vessel's tortious activity; the damages suffered were not dependent on the presence of some physical injury. Moreover, by virtue of the general

average, cargo owners had a "proprietary interest" in the common marine venture, which involved the vessel, her cargo, and her freight.

In *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858 (1986), this Court indicated that the *Robins* rule remains a viable doctrine in maritime tort law. Commenting on *Robins*, this Court stated:

> In products-liability law, where there is a duty to the public generally, foreseeability is an inadequate break [citations omitted]. Permitting recovery for all foreseeable claims for purely economic loss could make a manufacturer liable for vast sums. It would be difficult for a manufacturer to take into account the expectations of persons downstream who may encounter its product. In this case, for example, if the charterers — already one step removed from the transaction — were permitted to recover their economic losses, then the companies that subchartered the ships might claim their economic losses from the delays, and the charterers' customers also might claim their economic losses, and so on. "The law does not spread its protection so far." *Robins Dry Dock & Repair Co. v. Flint* [citation omitted].
>
> And to the extent that courts try to limit purely economic damages in tort, they do so by relying on a far murkier line, one that negates the charterers' contention that permitting such recovery under a products-liability theory enables admiralty courts to avoid difficult line drawing.

476 U.S. at 874-75.

As recognized by this Court in *East River Steamship Corp.*, the *Robins* rule remains a viable doctrine in maritime tort law.

## CONCLUSION

Under the circumstances, petitioner's application does not present any issue requiring Supreme Court review. Accordingly, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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**APPENDIX:** Listing of parent, Subsidiary and Affiliate Companies of ODECO, Inc. Pursuant to Supreme Court Rule 28.1

ODECO, Inc. is a wholly owned subsidiary of Ocean Drilling and Exploration Company (ODECO). ODECO has a corporate parent, Murphy Oil Corporation, which owns 60.9% of ODECO's stock. ODECO has no affiliates but does have numerous direct and indirect wholly owned subsidiaries as well as the following indirect subsidiaries which are not wholly owned:

BEN ODECO (Bermuda) Limited, BEN ODECO Drilling Limited, Pyramid Drilling S.A. and BEN ODECO Limited.